TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 922.

NORTH GERMAN LLOYD, CLAIMANT OF THE STEAMSHIP "KRONPRINZESSIN CECILIE," PETITIONER,

vs.

GUARANTY TRUST COMPANY OF NEW YORK AND NATIONAL CITY BANK OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1917.
CERTIORARI AND RETURN FILED MARCH 26, 1917.

(26,752)

(25,752)

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1915.

STEAMSHIP KRONPRINZESSIN CECILIE.

No. 1196.

GUARANTY TRUST COMPANY OF NEW YORK,
LIBELLANT, APPELLANT,

v.

NORTH GERMAN LLOYD,
CLAIMANT, APPELLEE.

No. 1197.

CHARLES W. RANTOUL, Jr. *v.* **SAME.**

No. 1198.

MAURICE HANSSENS *v.* **SAME.**

No. 1199.

NATIONAL CITY BANK OF NEW YORK *v.* **SAME.**

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM FINAL DECREES (HALE, J.), MARCH 22, 1916.

RECORD.

J. PARKER KIRLIN,
CHARLES R. HICKOX,
JAMES M. BECK,
EDWARD E. BLODGETT,
KIRLIN, WOOLSEY & HICKOX,
SHEARMAN & STERLING,
for Appellants.

JOSEPH LAROCQUE,
CHARLES F. CHOATE, JR.,
CHOATE, LAROCQUE & MITCHELL,
for Appellees.

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.

Libel of Guaranty Trust Co.

To the Honorable James M. Morton, Jr., United States District Judge, for the District of Massachusetts.

The libel and complaint of the Guaranty Trust Company of New York, against the Steamship *Kronprinzessin Cecilie,* her engines, boilers, tackle, apparel and furniture, in a cause of contract, civil and maritime, alleges as follows: 2

FIRST: The libelant is now, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of New York.

SECOND: The steamship *Kronprinzessin Cecilie* is a German steamship, owned by the North German Lloyd, a corporation existing under the laws of the Empire of Germany. At the times 3 hereinafter mentioned the *Kronprinzessin Cecilie* was operating as a common carrier between the ports of New York City and Bremerhaven, Germany, via English and French ports.

THIRD: On or about the 27th day of July, 1914, the libelant delivered to and shipped on board the steamship *Kronprinzessin Cecilie,* then lying in the port of New York, bound for Bremerhaven, 4 Germany, via Plymouth, England, in good order and condition, ninety-three (93) kegs of Gold Bullion, marked G T C, of the agreed and declared value of $4,942,936.64, to be carried and transported by the said steamship *Kronprinzessin Cecilie,* as a common carrier, to Plymouth, England, thence to be forwarded to London, at steamer's expense, and there to be delivered, in like good order and condition, as when shipped,

5 *Libel of Guaranty Trust Co.*

unto the order of the shipper, this libelant, in consideration of freight in the sum of $9,268, which was prepaid at the time of the said shipment. The owner of the steamship thereupon duly delivered to this libelant a certain bill of lading binding said steamship to transport and deliver the gold as aforesaid.

6 FOURTH: Thereafter, the steamship *Kronprinzessin Cecilie* proceeded on her voyage from New York towards Plymouth, England, at which port she would have arrived and delivered the gold on August 2nd, 1914, but for the deviation hereinafter mentioned. Instead of proceeding to Plymouth, England, with the said ninety-three (93) kegs of gold, and delivering them there as agreed to the libelant, or its order, the steamship,
7 as the libelant is informed and believes, improperly, and in breach of her contract aforesaid, turned back on her course, when in a position about nine hundred miles from Plymouth, abandoned her voyage finally, and proceeded to Bar Harbor, Maine. Said vessel, as libelant is informed, has proceeded, or is about to proceed to Boston.

The failure of the steamship to continue and complete her voyage to destination, the final aban-
8 donment of the voyage, and the return of the vessel to a port in the United States, were due to the anticipated outbreak of war in Europe. The libelant alleges, however, that a state of war did not exist between Great Britain and Germany prior to 11 p. m., on August 4th, 1914, Greenwich time, and that, prior to that time, the steamship in the ordinary course of her voyage would have reached the port of Plymouth and discharged and

delivered the libelant's gold in accordance with her contract.

Said steamship, in violation of its duty has failed and refused to carry and transport the said kegs of gold to Plymouth, England, and there deliver and forward the same in accordance with the terms of the aforesaid contract with libelant.

FIFTH: In view of the wrongful abandonment of the voyage and of the deviation of the steamer to Bar Harbor, and of the indefinite postponement of her further movements, the libelant on or about August 8, 1914, accepted re-delivery of said ninety-three (93) kegs of gold from the steamship *Kronprinzessin Cecilie*, upon an agreement with the owner of said vessel, through their duly-constituted general agents at New York, that such re-delivery of the gold should not constitute a waiver of or in any way prejudice the libelant's claim against said steamship arising from the failure to deliver the gold in England in accordance with the terms of the bill of lading.

SIXTH: By reason of the failure of the steamship *Kronprinzessin Cecilie* to deliver the said gold at Plymouth, England, as agreed, the libelant has suffered damages exceeding the sum of $1,040,467.43, no part of which has been paid, although duly demanded of the steamship, and her owner.

SEVENTH: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court, and the said vessel now is, or during the currency of process to be issued under this libel, will be within this district.

13 *Libel of Guaranty Trust Co.*

WHEREFORE, the libelant, the Guaranty Trust Company of New York, claiming a lien upon said steamship *Kronprinzessin Cecilie* by reason of the premises for the sum of $1,040,467.43 now due to it and unpaid as set forth prays,

1. That process *in rem* in due form of law according to the course and practice of this court
14 in proceedings in admiralty issue forthwith against the said steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, and that the said steamship be arrested and seized thereunder.

2. That all persons having any interest in the said steamship, her engines, boilers, tackle, apparel and furniture, may be cited and summoned to appear and answer in the premises.

15 3. That the Court will decree in favor of the libelant, The Guaranty Trust Company of New York, against the steamship *Kronprinzessin Cecilie* for the damages as claimed in this libel in the sum of $1,040,467.43 with interest from August 3rd, 1914, together with the costs and disbursements of this action.

4. That the said steamship *Kronprinzessin Cecilie* may be ordered by the Court to be condemned
16 and sold and the proceeds of said sale applied to the said claim of the libelant.

5. That the owner or claimant of the steamship *Kronprinzessin Cecilie* be required to answer in writing and under oath the interrogatories annexed to this libel, and to produce all documents demanded by said interrogatories.

6. That the Court will grant to the libelant

such other and further relief as shall be just in the premises.

CONVERS & KIRLIN,
BLODGETT, JONES, BURNHAM & BINGHAM
Proctors for Libelant.

STATE OF NEW YORK, }
County of New York. } ss.:

MAX MAY, being duly sworn, deposes and says:

I am one of the Vice-Presidents of the Guaranty Trust Company of New York, libelant herein.

The foregoing libel is true of my own knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters I believe it to be true.

The reason that the verification is not made by the libelant itself is that it is a corporation existing under the laws of the State of New York.

MAX MAY.

Sworn to before me this 15th }
day of October, 1914. }

CLETUS KEATING,
Notary Public 2068,
[SEAL] New York County.

Filed October 21, 1914.

A motion to amend the libel was granted on February 23, 1915 increasing the amount claimed as damages to $1,793,278.22.

21 UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY OF NEW YORK,
Libelant,

AGAINST

22 THE S. S. "KRONPRINZESSIN CECILIE," her engines, boilers, etc.,
Respondent,
NORTH GERMAN LLOYD,
Owner and Claimant.

To the Honorable the Judges of the District Court of the United States, for the District of Massachusetts:

23 And now NORTH GERMAN LLOYD, a corporation organized and existing under the laws of the Empire of Germany and engaged in the transaction of business in the Southern District of New York, intervening as owner of the S. S. "*Kronprinzessin Cecilie*," her engines, boilers, etc., appears before the Honorable Court and claims the said steamship, her engines, boilers, etc., as the same are attached by the Marshal, and avers that it is 24 the true and *bona fide* owner of the said steamship, her engines, boilers, etc., and that no other person is the owner thereof.

WHEREFORE it prays to defend accordingly.

NORTH GERMAN LLOYD, By
CHARLES VON HELMOLT
Attorney in Fact.
CHOATE, LABOCQUE & MITCHELL,
Proctors for Claimant.

Verified 7th day of November, 1914.

Answer to Libel of Guaranty Trust Co.

To the Honorable James M. Morton, Jr., United States District Judge for the District of Massachusetts.

The answer of North German Lloyd, owner and claimant of the Steamship *Kronprinzessin Cecilie,* her engines, boilers, tackle, apparel, and furniture, to the libel and complaint of Guaranty Trust Company of New York in a cause of contract, civil and maritime, alleges as follows:

I.

It admits the matters alleged in the First and Second articles of the libel.

It admits that on or about the 27th day of July, 1914, the libelant delivered to and shipped on board said steamship, then lying in the port of New York bound for Bremerhaven, Germany, via Plymouth, England, ninety-three (93) kegs of gold bullion said by the libelant to contain gold bars, marked G T C, and that the value thereof was declared by the shipper to be $4,942,936.64, to be carried and transported by said steamship to Plymouth, England, and thence to be forwarded to London at steamer's expense but at owner's risk. It denies that it has any knowledge, except by said libel, as to whether said ninety-three (93) kegs of gold bullion were shipped in actual good order or condition, and it denies that any agreement was made between the parties as to the actual value thereof, but admits and alleges that it was agreed by and between the parties that in no case would the steamer or carrier be responsible for a greater value than that so declared. It alleges that the carriage of the said bullion was undertaken by the claimant subject to and in accordance with the conditions and exceptions con-

tained in a certain bill of lading, a copy of which is hereto annexed marked Exhibit "A," which was issued by the claimant and accepted by the libelant as the contract of carriage covering the shipment in question, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of an European war. It admits the prepayment of freight in the sum of $9,268 and admits and alleges that it thereupon delivered to the libelant the said bill of lading, but denies that said bill of lading bound said steamship to transport and deliver the gold at all events or as alleged in the said libel.

It admits that said steamship proceeded on her voyage from New York towards Plymouth, England, but denies that but for the alleged deviation in said libel mentioned she would have arrived or delivered the gold in question on August 2, 1914, and in that behalf denies any knowledge or information as to whether said steamship would ever have arrived at said port.

It admits that said steamship turned back on her course and proceeded to Bar Harbor, Maine, but denies that at the time of such turning her position was about 900 miles from Plymouth, and in that behalf alleges that the said distance was in fact 1070 miles or more. It admits that she has proceeded to Boston, Massachusetts.

It denies that the failure of the steamship to continue and complete her voyage to her destination, or the alleged final abandonment of her voyage, or her return to a port in the United States, was due merely to the anticipation of the outbreak of war in Europe, and in that behalf claim-

ant alleges that the decision of the S. S. *Kronprinzessin Cecilie's* captain to return to a United States port was based upon creditable information received by him in a wireless message that a war had broken out involving Germany with Russia, France and England; that this message was received from a most reliable source, viz, the North German Lloyd office at Bremen, and that this message, considered in conjunction with the information with respect to the European crisis that he had received prior to sailing, furnished reasonable ground for the captain to apprehend that the said steamship and cargo would be captured if she continued her voyage, and required him, in the exercise of sound judgment and discretion, to put back to a port of refuge. If, however, war had not actually broken out at the time of the receipt of this wireless message, still the captain of the *Kronprinzessin Cecilie,* in anticipation of the outbreak of hostilities and the consequent danger of arrest of the members of his crew, the arrest or prolonged detention and resulting discomfort of his passengers and the capture of his ship and cargo, would have been fully justified in adopting the precise course which he pursued.

It denies that said steamship has violated any contractual or other duty which it owed the libelant.

It admits that on or about August 8, 1914, the libelant accepted redelivery of ninety-three (93) kegs of gold from said steamship, and alleges that such redelivery was at the libelant's special instance and request contained in a letter dated August 8, 1914, but that the contents of such letter, referred to as an "agreement" in the Fifth

37 *Answer to Libel of Guaranty Trust Co.*

clause of the libel, is therein so inaccurately and incompletely set forth that a copy thereof is hereto annexed marked Exhibit "B."

It denies that by reason of the alleged failure of the steamship *Kronprinzessin Cecilie* to deliver the said gold at Plymouth, England, as agreed, libelant has suffered damages in the
38 amount of $1,040,467.43 or in any other amount. It admits that no part of said sum has been paid and that demand therefor has been made.

It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and also admits that the steamship *Kronprinzessin Cecilie* is now in this district, but, except as hereinabove admitted, it denies that any of the premises of said libel are true.

39 II.

Further answering the libel, claimant says that its said S. S. *Kronprinzessin Cecilie* was built in the year 1907 at a cost of about $4,500,000; that at the time of the voyage hereinafter described she was fully fitted, manned and equipped and had a full complement of officers and crew amounting in all to 650 men.

On July 28, 1914, the *Kronprinzessin Cecilie*
40 sailed from the port of New York having on board passengers, and gold bullion or bars and gold coin of the declared value of $10,769,545.36, and bar silver of the declared value of $389,846.34, consigned to London and Paris via Plymouth and Cherbourg respectively. The gold and silver consigned to London, of which libelant's shipment constituted a part, were of the total declared value of $6,394,502.87, while the gold consigned to Paris was of the total declared value of $4,764,888.83.

41

In addition to this specie, the ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335.

The shipment of this large amount of specie on one of the most valuable vessels afloat was given great publicity and was the subject of repeated comment in the public press of this country and Europe, and the captain of the *Kronprinzessin Cecilie* had good reason to believe that the cruisers of Russia, France and Great Britain would make every effort to capture so rich a prize.

42

While said steamship was proceeding on her voyage a general war broke out in Europe in which Germany was involved, and owing to the danger of capture if she proceeded on her voyage, on the evening of July 31, 1914, when the *Kronprinzessin Cecilie's* position was 46° 46′ N and 30° 21′ W longitude from Greenwich, which was 1070 miles or more from Plymouth, or more than two days' journey, she turned back on her course and returned to this country, and on August 4, 1914, put into Bar Harbor, Maine, where, on the 8th day of August, 1914, at the special instance and request of the libelant she redelivered to it all the gold in question.

43

The return of the *Kronprinzessin Cecilie* to a port of the United States was not only a justifiable precaution, but was based upon reasonable ground for apprehension of capture and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew and to the cargo owners, and was a measure adopted by him in good faith in the exercise of his best judgment and discretion for the benefit of all concerned. A large part of her cargo was destined for France and Germany, and even if

44

the ship had succeeded in reaching Plymouth, England, and, after discharging her English bullion and passengers, in leaving that port without interference by the English authorities, she would have been in a most critical position with reference to the hostile fleets. A state of war existed between Germany and France and Russia before the date on which she could have arrived in due course at Plymouth, or Cherbourg, and even if she could have eluded the watchfulness of French cruisers, upon her arrival at Cherbourg, she would have been seized by the French authorities. In such circumstances it was impossible to reach Bremerhaven, her port of final destination, by passing through the English Channel, and running the gauntlet of both French and British fleets. The Russian fleet, whose position was unknown to the captain of the *Kronprinzessin Cecilie*, was an additional factor which was necessarily considered by him in making his decision. The only other course she could have pursued was to make directly for Bremerhaven without touching at any English or French port, in which event, if she had reached Bremerhaven without capture, although the ship herself would have been safe, the specie consigned to France and England would have been seized by the German Government.

Before the *Kronprinzessin Cecilie* commenced her return voyage the sailing of ships from German ports had been cancelled, traffic in the North Sea had been suspended, one or more English ports had been closed, the great powers had commenced a general mobilization of their land and sea forces, the channel service between England and France had been interrupted, a German mer-

chantman had been captured by Russian cruisers, British ships had been forcibly detained in German ports and some of them had been compelled to discharge their cargoes, by Imperial proclamation, Germany had been declared in a state of war and German vessels in all parts of the world had been ordered to seek or remain in neutral ports.

The wireless message to the *Kronprinzessin Cecilie* was withheld by the North German Lloyd office until the last possible moment and until it was apparent that if she were permitted to proceed further she would not have sufficient coal to reach a port of refuge. As it was, when she arrived at Bar Harbor, there remained in her bunkers only 450 tons.

The action of the captain in directing the return of said steamship to the United States where the rights of all those interested in both ship and cargo would be respected and protected was in concurrence with the instructions received from her owners as contained in the wireless message aforesaid and such instructions and the action following them were fully justified by the circumstances and were the exercise of a right given by the laws of the United States as well as by Article 634 of the Maritime Code of the German Empire which provides in substance that if a war be declared after the commencement of a voyage, in consequence of which a vessel or the goods shipped thereon can no longer be considered free and would be liable to risk of capture, either party has the right to withdraw from the contract without being liable to damages, and by Article 669 and 670 of said Maritime Code, and by other provisions of the Laws of Germany.

The course pursued by the captain was en-

53 *Answer to Libel of Guaranty Trust Co.*

tirely successful and his return to a port of refuge and the delivery of all the specie to the parties entitled thereto were accomplished without the capture or detention of a single passenger or member of the crew, and without loss of or damage to any of the specie or mixed cargo.

III.

54 Further answering the said libel, claimant alleges that it undertook the transportation of the ninety-three (93) kegs of gold therein referred to in accordance with the provisions of a certain bill of lading, copy of which is hereto annexed marked Exhibit "A" which was issued by the claimant and accepted by the libelant as the contract of carriage covering the shipment in question. That the said bill of lading expressly provided that
55 neither the steamer nor carrier should be liable for loss or damage occasioned by arrest and restraint of princes, rulers or people. Claimant further alleges that if the libelant has in fact sustained any damage, the same was occasioned solely by the cause so excepted.

IV.

Claimant further alleges that said bill of lad-
56 ing likewise expressly provided that neither the steamer nor carrier should in any case be responsible for a value greater than that declared by the shippers in the margin. That the value of the shipment in question was declared by the libelant in the margin of said bill of lading to be $4,942,937.64. That all the gold, representing said shipment and the value so declared was redelivered by claimant to the libelant at Bar Harbor, Maine, on August 8, 1914, and that immediately

57

upon such redelivery all further responsibility on the part of this claimant or its ship, *Kronprinzessin Cecilie*, ceased.

V.

Claimant further alleges that at the time of said shipment it was understood and agreed by and between the parties that time should not be 58
of the essence of the contract, and in that behalf it alleges that said bill of lading expressly provides that said steamer should have "liberty to call at Intermediate Ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes", and that in accordance with the terms of said bill of lading it was understood and agreed that the steamer should have liberty to put into a port of refuge, and that 59
neither the steamer nor carrier should be liable for "loss or damage by prolongation of the voyage."

WHEREFORE, claimant prays that the libel may be dismissed with costs, and that it may receive such other or further relief as in justice it may be entitled to receive.

CHOATE, LAROCQUE & MITCHELL, 60
Proctors for Claimant,
40 Wall Street,
New York.

STATE OF NEW YORK, }
County of New York, } ss.:

WILHELM L. C. B. SIEGEL, being duly sworn, deposes and says that he is a member of the firm of Oelrichs & Co. the general agents in the United

61 *Answer to Libel of Guaranty Trust Co.*

States for the North German Lloyd, the claimant herein; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILHELM L. C. B. SIEGEL.

62 Sworn to before me this 27th day of November, 1914.

PAUL SCHMID,
[SEAL] Notary Public,
Kings County, No. 264.

Filed December 1, 1914.

63

64

ORTH GERMAN LLOYD

BREMEN.

OELRICHS & CO.,

GENERAL AGENTS,

BROADWAY, NEW YORK.

LANDO DAVIS & CO., 36 Southside St., Plymouth.

ELLER, BRYANT & Co., Southampton, London.

NORTH GERMAN LLOYD,
12 Quai Alexandre III, Cherbourg.

NORTH GERMAN LLOYD, 2 Rue Scribe, Paris.

AGENTUR DES NORDDEUTSCHEN LLOYD,
Bremerhaven.

DIRECTION DES NORDDEUTSCHEN LLOYD,
Papenstrasse, Bremen.

FREIGHT MEMO.

tual value declared by Shipper:

4,942,937.64

ight at the rate of 3/16 *per cent.*

repaid $ 9268

rty to be notified: GUARANTY TRUST CO
OF NEW YORK 83 LOMBARD STREET
LONDON E C ENG

at

☞ When goods are shipped "to order" it is desirable to have the above

Received, in apparent

to be transported by the Steamer

with liberty to call at **Intermediate Por**

MARKS	NUM
G T C	1 TC
	INCL

***Total Value** (in words) U. S. Doll*

being marked and numbered as above, shipp

and thence to be forwarded at steamer's exp
GUARANTY TRUST CO
unto

Specie for London will be lan
for Paris will be landed at Cherbo
any other Weser port and will be fo

1. IT IS MUTUALLY AGREED that the steame liberty to convey goods in craft and/or lighters to and mer shall put into a port of refuge, or be prevented fro the goods to their destination by any other steamer; th perils of the sea or other waters, by fire from any pirates or robbers; by acts of theft on sea or land; by labor; by explosion, bursting of boilers, breakage of sha of the steamer, whether existing at time of shipment diligence to make the steamer seaworthy; by heating breakage, vermin, or by explosion of any of the g damage arising from the nature of the goods or the insufficiency or absence of marks, numbers, address damage caused by prolongation of the voyage, and quality, quantity, gauge, contents, weight, and value the steamer shall have exercised due diligence to supplied, it is hereby agreed that in case of danger, in the navigation or management of the steamer, worthiness of the steamer, whether existing at tim diligence, the consignees or owners of the cargo sha ship as well as to cargo or for any special charges danger, damage or disaster had not resulted from suc or unseaworthiness. In case of salvage services ren same line, such salvage services shall be paid for effects, if any, not to contribute in General Average less their proper contribution in such case.

2. ALSO, that this shipment is subject to all th Act of Congress of the United States, approved on vessels, etc."

3. ALSO, that the steamer, lighter and carrier sha United States, unless written notice of the true char

4. ALSO, that the steamer and carrier shall h or damages which the steamer or cargo may incur c addressing of packages or description of their co

And finally, in accepting this B whether written or printed, as fully as i

IN WITNESS WHEREOF the age

27

Dated in NEW YORK this

ECIE BILL OF LADING FOR LONDON, PARIS AND BREMEN.

n apparent good order and condition, by the NORTH GERMAN LLOYD, from GUARANTY TRUST CO OF NEW YORK

amer KRONPRINZESSIN CECILIE, now lying in the port of NEW YORK and bound for *Bremen*,

iediate Ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes.

	NUMBERS	Total number of cases, kegs, packages, etc., in figures	Total number of cases, kegs, packages, etc., in words	SAID TO CONTAIN	Actual value declared by shipper.
	1 TO 93	93	NINETY THREE KEGS OF GOLD BULLION	GOLD BARS	$ 4,942,937.64
	INCLUSIVE				

) *U. S. Dollars* FOUR MILLION NINE HUNDRED FORTY TWO THOUSAND NINE HUNDRED THIRTY SEVEN 64/

is above, shipper's value, (quality, quantity, gauge, weight, touch, contents and value unknown), and to be delivered in like order and condition at *Plymouth* ~~*Southampton*~~ ~~*Cherbourg*~~ ~~*Bremerhaven*~~

steamer's expense, but at owner's risk, (steamer's responsibility to cease as soon as the goods are free from the ship's tackles) to LONDON, ~~PARIS~~, ~~BREMEN~~,
RUST CO OF NEW YORK or to his or their assigns.

will be landed at Plymouth or Southampton (as the case may be), and will be forwarded by rail AT OWNER'S RISK and at steamer's expense. Spec
l at Cherbourg and will be forwarded by rail at OWNER'S RISK and at steamer's expense. Specie for Bremen will be landed at Bremerha
nd will be forwarded by rail, river steamer or lighter to Bremen AT OWNER'S RISK and at steamer's expense.

) that the steamer shall have liberty to sail with or without pilots; that the carrier shall have
w lighters to aid from the steamer at the risk of the owners of the goods; and, in case the stea-
be prevented from any cause from proceeding in the ordinary course of her voyage, to transship
other steamer; that the steamer and carrier shall not be liable for loss or damage occasioned by
y fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies,
n sea or land; by arrest and restraint of princes, rulers or people, riots, strikes, or stoppage of
s, breakage of shafts, or any latent defect in hull, machinery or appurtenances, or unseaworthiness
time of shipment or at the beginning of the voyage, provided the owners have exercised due
ithy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage,
f any of the goods whether shipped with or without disclosure of their nature, or any loss or
the goods or the insufficiency of packages; nor for land damage; nor for the obliteration, errors,
others, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or
the voyage, and that the carrier shall not be concluded as to correctness of statements herein of
eight, and value. General average payable according to York-Antwerp Rules. If the owner of
ue diligence to make said steamer in all respects seaworthy and properly manned, equipped and
case of danger, damage or disaster resulting from fault or negligence of the master, pilot or crew
f the steamer, or from latent or other defects in hull, machinery or appurtenances, or unsea-
r existing at time of shipment or at the beginning of the voyage, but not discoverable by due
s of the cargo shall not be exempted from liability for contribution in General Average, both to
special charges incurred, but, with the shipowner, shall contribute in General Average as if such
resulted from such fault, negligence, latent or other defects in hull, machinery or appurtenances,
vage services rendered to aforesaid merchandise or treasure during the voyage by a vessel of the
all be paid for as fully as if such salving vessel or vessels belonged to strangers. Passenger's
General Average, but claims for passengers' effects sacrificed to be allowed in General Average,
h case.

subject to all the terms and provisions of, and all the exemptions from, liability contained in the
tes, approved on the 13th day of February, 1893, and entitled "An Act relating to the navigation of

ier and carrier shall not be liable for articles specified in section 4281 of the Revised Statutes of the
of the true character and value thereof is given at the time of lading and entered in the bill of lading.
d carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines
argo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering or
tion of their contents. Bills of Lading must be made out in accordance with the prescriptions and

regulations of Port, Customs or Consular authorities. Consular, Board of Health or other certificates required to accompany
goods are to be procured by shippers, and any detention, charges or penalties occurring to steamer or cargo, owing to the want o
such certificates, are to be borne by the shippers and/or consignees. *Steamer will not be responsible for delay in the delivery of goods not plainly marked with the port of destination.*

5. *ALSO, that the steamer may commence discharging immediately on arrival and discharge continuously, any custom of the port to the contrary notwithstanding, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master or steamer's agent to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the payment of all costs and charges so incurred.*

6. ALSO, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

7. *ALSO, that the steamer has the privilege to revalue any goods where reasonable doubt exists as to the correctness of values and any excess must be paid for at the rate of freight. The expenses of valuation shall be paid by the party in error. Goods wrongly described as to the real nature of their contents are liable for such additional freight as may be due.*

8. ALSO, that for metal in slabs, bars, ingots, rods, hoops, plates, etc., or any other articles not packed properly, but shipped loose or in bundles, steamer is responsible for the total number of pieces or bundles only and not for their respective marks and/or weight and/or measurement.

9. *ALSO, that in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the Custom House, less all charges saved. In case of loss the claimant is to furnish, if required, satisfactory proof of value, and the steamer or carrier shall in no case be responsible for a greater value than that declared by the shippers in the margin, also that incorrect or wrong declaration of the shipment shall release the steamer or carrier from all responsibility. All claims for short delivery, loss, damage, or of whatever nature, must be made in writing to the steamer's agent at the port of destination of the goods, within 5 days after the steamer or lighter finished discharging and ALWAYS BEFORE the goods are taken delivery of by the consignee, and in case such claims shall not be presented in writing within the time and the place herein before designated, such loss or damage shall be deemed to be waived and the steamer discharged therefrom.*

10. ALSO, that merchandise on wharf or lighter awaiting shipment or delivery be at shipper's risk of loss or damage not happening through the fault or negligence of the owner, master, agent or manager of the steamer or lighter, any local customs or privileges to the contrary notwithstanding.

11. ALSO, that this Bill of Lading, duly endorsed, be given up to the steamer's agent in exchange for a delivery order.

12. ALSO, that the freight is payable on the actual value before shipment. Freight prepaid will not be returned, goods lost or not lost.

13. ALSO, that parcels for different consignees collected or made up in single packages addressed to one consignee pay full freight on each parcel.

epting this Bill of Lading, the shipper, ovner and consignee of the goods and the holder of the Bill of Lading agree to be bound by all of its stipulations, exceptions and conditions, as fully as if they were all signed by such shipper, owner, consignee, or holder, any local customs or privileges to the contrary notwithstanding.

EOF the agents of the said steamer have affirmed to TWO Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

is 27TH day of JULY 191 4

For OELRICHS & CO., Agents,

69 EXHIBIT B.

GUARANTY TRUST COMPANY OF NEW YORK.

New York, August 8, 1914.

NORTH GERMAN LLOYD,
MESSRS. OELRICHS & COMPANY,
Agents, North German Lloyd,
5 Broadway, New York City.

Dear Sirs:

70 We understand and admit the fact to be that the North German Lloyd Steamship *Kronprinzessin Cecilie*, which sailed from this port on July 28th, last, owing to the outbreak of war in Europe, put into the port of Bar Harbor, Maine, where she now lies, and that the continuation of her voyage to the port or ports of original destination is indefinitely postponed.

We have on board said steamship 93 kegs of gold bullion marked GTC and numbered 1/93 incl., 71 of the value of $4,942,937.64. The bill of lading therefor, which was issued in duplicate, provides for the delivery at London of this shipment unto "Guaranty Trust Company of New York or to his or their assigns." Clause eleven provides that "this bill of lading duly endorsed be given up to the steamer's agent in exchange for a delivery order."

In our dual capacity of consignor and consignee 72 we now request you to place the same on board the United States Revenue Cutter *Androscoggin* alongside said steamship, to be lightered to the dock and there delivered to the American Express Company, the said gold to be carried to the City of New York at our expense and risk from the time it is placed on board the *Androscoggin*, and consigned to the United States Sub-Treasury subject to the order of the North German Lloyd or Oelrichs & Company as its General Agents, but still at the expense and risk of the Guaranty Trust

Exhibit B.

Company. We agree that the delivery of the said gold to the American Express Company shall be upon the latter's duplicate receipt in form following:

(Follows American Express Co. receipt.)

One of the duplicates of the bill of lading has been forwarded to the Guaranty Trust Company of New York at London and will be delivered upon its receipt to your agents in London. Upon the surrender of the other, which is now in our possession, you agree to give us an order for said gold, and as an inducement for granting our above request we assure you of the following facts:

1. That the Guaranty Trust Company of New York at New York and the Guaranty Trust Company of New York at London, the consignee named in the bill of lading, are one and the same corporation.

2. That the Guaranty Trust Company of New York in New York is authorized to accept redelivery of the said gold both on behalf of the consignor and consignee.

3. That no legal, equitable or other transfer or assignment has been made of the said gold or any part thereof, or any right, title or interest therein, nor has there been nor will there be any legal, equitable or other assignment, transfer or change of interest in the said original bill of lading or duplicate thereof, and that the sole unencumbered title to the said gold is in the Guaranty Trust Company of New York.

4. That one of the duplicate copies of the bill of lading was forwarded on July 28th last to the consignee at London by the steamship *La Savoie*. This duplicate will, at the earliest possible moment, be surrendered to Messrs. Keller, Bryant

77 *Exhibit B.*

& Company, 2 King William Street, London, E. C., the North German Lloyd Agents in London. In consideration thereof we hereby agree to indemnify and hold harmless your Company, the steamship *Kronprinzessin Cecilie* and Messrs. Oelrichs & Company, your Agents, from any and all suits, claims or demands of any and every kind or nature whatsoever or any third persons, aris-
78 ing out of, or in any way connected with, the redelivery of the said gold to us, and against any and all suits, claims or demands which may arise out of or be based upon our failure to surrender to you both duplicates of the bill of lading, and that when the said gold shall be placed upon the said Revenue Cutter *Androscoggin* alongside the ship at Bar Harbor, all liability on your part with reference to subsequent acts or omissions shall
79 cease; but the execution of the foregoing, the giving of the aforesaid guarantee and/or the acceptance of delivery of said gold on our part shall not constitute a waiver of or in any way prejudice, any claims or demands which we may make against you or either of you and/or said steamship *Kronprinzessin Cecilie*, arising out of the said bill of lading or said shipment, or any acts or defaults upon your part before the delivery of said gold into said Revenue Cutter, nor shall your
80 acceptance of the terms of this letter or the guarantee herein contained constitute any admission on your part of liability for any such claim.

GUARANTY TRUST COMPANY OF NEW YORK,
By Charles H. Sabin, Vice-President.

Attest: E. WEBBARD,
Secretary.

Accepted:

Oelrichs & Co., as General Agents of North German Lloyd.

Interrogatories of Guaranty Trust Co. and Claimant's Answers. 81

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY,
Libelant,

against

Steamship "KRONPRINZESSIN CECILIE," her engines, etc.
NORTH GERMAN LLOYD,
Claimant. 82

Interrogatories addressed to owner and claimant of the steamship *Kronprinzessin Cecilie,* and the answers thereto: 83

First Interrogatory:

(a) Give the precise time, stating day and hour, at which the steamer abandoned her voyage from New York to Plymouth, England?

(b) What was the position of the steamer by latitude and longtitude at the time the vessel turned back on her course?

(c) In what direction did she proceed after turning back? 84

Answer:

(a) The precise time at which the steamer turned back on her voyage from New York to Plymouth was Friday, July 31, 1914, at 10.09 P. M. ship's time.

(b) The position of the steamer at the time she turned back on her course was 46° 46′ North 30° 21′ West longitude from Greenwich.

85 *Interrogatories of Guaranty Trust Co. and Claimant's Answers.*

(c) After turning back she proceeded in a westerly direction.

Second Interrogatory:

(a) At, or shortly prior to the time when the steamer abandoned her course for Plymouth, England, did the captain of the steamship *Kron-*
86 *prinzessin Cecilie* receive a wireless message?

(b) If yea, please state the day and hour on which such message was received.

(c) Please produce a copy of any such message and annex it to your answers to these interrogatories.

(d) Was the message in code? If so, please produce a translation of the message, as well as the code message.

87 (e) From whom was such message received?

(f) How soon after the receipt of such message did the captain of the steamship *Kronprinzessin Cecilie* abandon his course to Plymouth, England?

(g) Did the captain of the steamship *Kronprinzessin Cecilie* act on the instructions contained in this wireless message in abandoning his course?

Answer:

88 (a) The captain of the steamship *Kronprinzessin Cecilie* received a wireless message shortly prior to the time when the steamer turned back on her course to Plymouth, England.

(b) The day and hour such message was received was July 31, 10 P. M. ship's time, or 11:45 P. M. Greenwich time.

(c) (d) The message was in the company's private code and the translation of it is as follows:

Interrogatories of Guaranty Trust Co. and Claimant's Answers.

"War has broken out with England, France, Russia. Turn back to New York." (Signed) "Managing Board of North German Lloyd." 89

(e) The message was received from the Norddeutscher Lloyd, Bremen.

(f) The captain of the steamship *Kronprinzessin Cecilie* turned back on his course to Plymouth, England, nine minutes after the receipt of said message. 90

(g) The captain of the steamship *Kronprinzessin Cecilie*, in turning back on his course, acted on the information and instructions contained in this wireless message and on information with respect to the European crisis that he had received before sailing and also exercised his own best judgment and discretion, which concurred with such instructions as to the best course to pursue. 91

Third Interrogatory:

(a) Is it not a fact that the steamship *Kronprinzessin Cecilie* abandoned her voyage towards Plymouth and turned back towards a neutral port in compliance with orders or instructions received by wireless communication from the owners or agents of said vessel? 92

(b) If you have not already done so, please attach copies of all wireless messages from the owners of said steamship, or their agents, bearing on that subject.

Answer:

(a) It is not a fact that the steamship *Kronprinzessin Cecilie* abandoned her course towards Plymouth and turned back towards a neutral port

93 *Interrogatories of Guaranty Trust Co. and Claimant's Answers.*

solely in compliance with orders or instructions received by wireless communication from the owners or agents of said vessel. The master also acted on his own judgment and discretion in the matter, which concurred with such instructions. But in seeking Bar Harbor instead of New York
94 as a port of refuge, the master acted solely on his own best judgment and discretion after consultation with his officers.

(b) On August 1st, between 11 and 12 P. M. ship's time, or 9 to 10 P. M. Standard Time, when the ship's position was 45° 26′ North 44° 55′ West, the ship intercepted the following messages sent out by Oelrichs & Co., the agents of the North German Lloyd at New York, to other steamers of the company:

95

"New York: Captain S. S. *Neckar* WSL/ return immediately to Galveston or any U. S. port acknowledge these Orders/ Oelrichs and Co.

New York: Captain S. S. *Willehad* WSL/ Return Boston immediately acknowledge these orders/ Oelrichs and Co.

96 New York: To Captain *Fredrich Der Grosse* WSL/ Return New York immediately acknowledge these Orders/ Oelrichs and Co.

New York: Captain *Grosser Kurfuerst* WSL/ Return New York immediately acknowledge these orders/ Oelrichs and Co."

Interrogatories of Guaranty Trust Co. and Claimant's Answers.

97

On August 2nd, at 11 P. M. Standard time, which was 12.03 A. M. ship's time of August 3rd, when the steamer's position was 44° 3′ North 55° 27′ West, an exact repetition of the wireless message referred to in the answers to the Second Interrogatory was received by the steamer by way of Sayville.

98

Fourth Interrogatory:

(a) Did the captain of the steamship *Kronprinzessin Cecilie*, after arrival at Bar Harbor, Maine, report by cable, or in writing, to his New York agents, or to the office of the North German Lloyd?

(b) If yea, please produce and annex to your answers to these interrogatories the original cable and / or letter making this report, and if it is in German, please annex in addition a translation thereof.

99

Answer:

(a) The captain of the steamship *Kronprinzessin Cecilie*, after arrival at Bar Harbor, Maine, sent a wireless message to the Company's Inspection at Hoboken, New Jersey, and later made a report in writing to the Home Office of the Company at Bremen, Germany.

100

(b) The wireless message sent to Hoboken was as follows:

"August 4th, 5:20 A. M. ship's time or 4:08 Standard time,

Inspection,

Hoboken, New Jersey.

Kronprinzessin Cecilie arrived all well Bar Harbor. Await instructions what to do with passengers and specie. Advise Bremen.

Polack."

Interrogatories of Guaranty Trust Co. and Claimant's Answers.

The German text of this message is:

4ten August 5:20 Vm. Std. Zt.

Inspection. Hobokennj. Kronprinzessin Cecilie wohlbehalten Bar Harbor angekommen. Ewarts Nachricht was mit Passagieren und Kontanten geschehen soll. Benaohrichtigt Bremen.

(Gez.) Polack.

The report made to the Home Office at Bremen, was as follows:

"Bar Harbor, Maine, August 21.

To the North German Lloyd,
Nautical Department,
Bremen.

Regarding the war trip of the *Kronprinzessin Cecilie* I report the following:

On July 28th at 3 A. M. we passed Ambrose Channel Lightship, steamed eastward on the prescribed course up to July 31st to 46° 46′ N 30° 21′ W. Here we received the order to return which was immediately carried out. While the ship was still in the act of turning I directed that the passengers of the first and second cabin be requested to repair to the smoking room, and when the ship was on the course to westward I went down and acquainted them with the fact that war had broken out and that I had received orders from my Company to return to New York.

The passengers took the notification quietly, the Americans called hurrah. I ordered the officials of the wireless telegraph not to touch the apparatus for sending and only to listen for what we might intercept from on land or from passing ships.

105

I told the operator further to still accept messages in order to let pass the first excitement. They were then returned together with the money to the passengers a few days later as undeliverable.

The trip westward was made smoothly and without mishap.

106

On Saturday August 1st shortly after noon we intercepted a telegram from the *La Savoie* to the French Fishing Cruiser *Friant*. 'Have succeeded in informing a fishing boat of the political situation and of your departure.' In the evening we saw the smoke of *Savoie* far in the north.

On August 2nd on the Bank we heard how a French ship said to another 'Position 44° 22′ N on the edge of the Bank.'

107

On August 3rd we overheard an exchange of telegrams in code between the English Cruiser *Essex* and the station at Halifax. This was about abeam of Halifax. As the signs from the *Essex* were not very strong and she might be watching the Port of New York just as well as the Port of Boston I called my officers for ship's council in which it was decided to run into the Port of Bar Harbor. We anchored here on the morning of August 4th 6 o'clock Standard time.

108

Part of the passengers were landed on the same day and the balance during the next days, also mail and baggage. 34 paupers and 5 insane were transported to New York on Saturday August 8th under supervision of Immigration Officials and our own men.

On the evening of August 8th we unloaded the gold and silver upon an American Rev-

109 *Interrogatories of Guaranty Trust Co. and Claimant's Answers.*

enue Cutter which brought it on Sunday morning to Mt. Desert railway station whence it was loaded by our people in good order into the cars of the American Express Company.

The value of the gold was $10,769,545.36.

The value of the silver was $389,846.34 ac-
110 cording to receipt of the officials.

From August 16th to 19th, 3,170 tons of coal were taken in. We discharged our cargo in twenty hours into a lighter which is to take it to New York on August 21st.

Ch. Polack."

The German text of this report is:

Bar Harbor, den 21. August, 1914.

111 An den

Norddeutschen Lloyd
Nautische Abteilung,
Bremen.

Betreffs der Kriegsreise des D. *Kronprinzessin Cecilie* berichte Ihnen folgendes:

Am 28. Juli um 3:00 worm. passierten Ambrose Channel Frsch., dampften auf dem vorgeschriebenen Kurse ostwärts bis zum 31, Juli auf
112 46.46 N, 30.21 W. Hier erhielten wir den Befehl zur Umkehr. der sofort ausgeführt wurde. Noch während das Schiff in der Drehung war, liess ich die Reisenden der 1. u. 2. Kl. in die Rauchzimmer bitten, und als das Schiff suf Kurs nach West anlag, ging ich hinunter und machte sie mit der Tatsache bekannt, dass Krieg ausgebrochen sei und ich von meiner Reederei Befehl bekommen habe, nach New York zurückzukehren.

Die Reisenden nahmen die Bekanntmachung mit Ruhe hin: die Amerikaner riefen: "Hurrah!"

Interrogatories of Guaranty Trust Co. and Claimant's Answers. 113

Den Beamten der drahtlosen Telegrafie befahl ich, den Apparat zum Geben nicht mehr anzürühren und nur zu horchen, was wir von Land oder vorbeifahrenden Schiffen auffangen konnten.

Weiter sagte ich den Telegrafisten noch Telegramme der Reisenden anzunehmen, um die erste Aufregung vorübergehen zu lassen. Diese wurden 114
den Reisenden dann in den nächsten Tagen als unbestellbar samt dem Gelde zurückgegeben.

Die Fahrt westwärts ging dann glatt und ohne Unfall von statten.

Am Sonnabend, den 1. August, kurz nach Mittag fingen wir ein Telegramm auf von *La Savoie* an den französischen Fischereikreuzer *Friant;* "ai reussi informer un chalutier situation politique et votre depart". Am Abend sahen wir den Rauch von *Savoie* weit in Norden. Am 2. August 115
auf der Bank hörten wir, wie ein französisches Fahrzeug einem anderen sagte; "Position 44.22 N sur les bords du plateau". Am 3. August überhörten wir einen Telegrammwechsel in "Code" zwischen dem englischen Kreuzer *Essex* und der Station von Halifax. Dieses war etwa quer von Halifax. Da die Zeichen des *Essex* nicht sehr stark waren und derselbe ebensogut den Hafen von New York wie den Hafen von Boston 116
bewachen konnte, berief ich meine Offiziere zum Schiffsrat, in welchem beschlossen wurde, den Hafen von Bar Harbor anzulaufen. Ankerten hier am Morgen des 4. August 6:00 St. Zt.

Die Reisenden wurden teilweise noch an demselben Tage und der Rest in den naöhsten Tagen gelandet, ebenso Post und Gepäck. 34 Pauper und 5 Geisteskranke wurden unter Bewachung von Einwanderungsbeamten und unserer eigenen Leute am Sonnabend, den 8. August nach New

117 *Interrogatories of Guaranty Trust Co. and Claimant's Answers.*

York befördert. Am Abend des 8 August löschten das Gold und Silber auf einen amerikanischen Zollkreuzer, der es am Sonntag Vormittag nach Mount Dessert Railway Station brachte, wo es von unseren Leuten in guter Ordnung in die Wagen der American Express Co. verladen
118 wurds.

Der Wert des Goldes war: $10 769 545—36

Der Wert des Silbers war: 389 846—34. laut Empfangsbescheinigung der Beamten!

Vom 16.—19. August wurden 3170 tons Kohlen eingenommen Loschten in 20 Stunden unsere Ladung, in einen Leichter, der am 21. August nach New York schleppen kann.

(Gez.) Ch. Polack.

119 Verification by Wilhelm L. C. B. Siegel, of the firm of Oelrichs & Co., November 27, 1914.

Filed December 1, 1914.

120

Interrogatories of Claimant and Answers of Guaranty Trust Co. 121

UNITED STATES DISTRICT COURT.

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY,
Libelant,

AGAINST 122

Steamship KRONPRINZESSIN CECILIE,
NORTH GERMAN LLOYD,
Claimant.

Interrogatories propounded to Libelant to be answered by its President or other officer under oath. 123

First Interrogatory: In the Sixth Article of your libel it is stated that the libelant has suffered damages exceeding the sum of $1,040,467.43. Please set forth in detail the computation by which you arrive at this sum, showing fully the manner in which the alleged damages are claimed to have resulted, and annex to your answer as a part thereof copies of all correspondence or written or telegraphic communications between your company, its officers, agents or attorneys, on the one hand, and your London office, its officers, agents or attorneys or third parties, on the other hand, or between your London office, its officers, agents or attorneys, on the one hand, and third parties on the other hand, in any way relating to the gold in question, covering the period prior to the shipment when the sending of the gold abroad was first considered and continuing down to the time of the ar- 124

rival of the steamer at Bar Harbor, excluding correspondence or communications between your company and its legal counsel. And please state in your answer that all correspondence and communications called for by this interrogatory have been so annexed.

Answer to First Interrogatory: The sum of $1,040,467.43 mentioned in the Sixth Article of the Libel does not represent the full damages of the Libelant. The proper sum is $1,793,278.22. This figure represents the difference between the value the libelant's shipment would have had if delivered in London by the claimant in accordance with the terms of its contract, and the value that the libelant reasonably obtained for the gold on its return to the libelant by the claimant, at Bar Harbor.

The value of the gold in London on August 4th, if delivery had been made there on August 3rd, by the claimant, would have been £1,014,059-18-3. This sum, at the exchange rate of $6.75 to the Pound Sterling, which was reasonably obtainable at that time was equivalent in United States currency to $6,844,904.39

From this sum, expenses should be deducted as follows:

Premium	$1,977.17	
Freight	9,268.00	
Insurance	2,500.00	
Cooperage and Cartage	313.60	
Interest July 27 to Aug. 4	6,590.57	20,649.34
Net value to the Libelant of the gold at London on August 4th		$6,824,255.05

Interrogatories of Claimant and Answers of Guaranty Trust Co. 129

When the libelant received the gold from the claimant on August 10th the gold was sent forward to a branch of the Bank of England at Ottawa, whence a credit was sent to London on August 20th, and was of the value of £1,010,799-5-6. This sum, at the exchange rate of $5.03½, which was the best rate reasonably obtainable at that time, was equivalent in United States currency 130
to $5,089,374.35

From this sum, expenses should be deducted as follows:		
Expenses of shipment to Ottawa, including insurance	$3,707.20	
Travelling exenses	88.10	
Interest from August 4 to August 20	13,181.14	16,976.44 131
Net value of the gold at London, Aug. 20		$5,072,397.91

The difference between the sums of $6,824,255.05 and $5,072,397.91 is $1,751,857.14.

The total damages of the libelant, therefore, are as follows:

Difference in value shown above ..	$1,751,857.14	132
Premium	1,977.17	
Freight	9,268.00	
Insurance	2,500.00	
Cooperage	313.60	
Interest July 27 to Aug. 4	6,590.57	
Shipment to Ottawa	3,707.20	
Traveling expenses	88.10	
Interest Aug. 4 to Aug. 20	16,976.44	
Total	$1,793,278.22	

133 *Interrogatories of Claimant and Answers of Guaranty Trust Co.*

Second Interrogatory: Please state fully and in detail what if any transfer or disposition was made of said gold after its redelivery to you at Bar Harbor, and on what terms and conditions, and under what circumstances it was ultimately transferred or disposed of, and annex to your
134 answer as a part thereof copies of all correspondence or written or telegraphic communications between your company, its officers, agents or attorneys, on the one hand, and your London office its officers, agents or attorneys or third parties, on the other hand, or between your London office, its officers, agents or attorneys, on the one hand, and third parties, on the other hand, in any way relating to the said gold or the damages claimed to have been suffered by you, covering the period
135 from the time the said steamer arrived at Bar Harbor down to the time of your answer to this interrogatory, excluding correspondence or communications between your company and its legal counsel. And please state in your answer that all correspondence and communications called for by this interrogatory have been so annexed.

Answer to Second Interrogatory: After the gold was obtained by the libelant from the *Kronprinzessin Cecilie* at Bar Harbor, it was sent for-
136 ward to Ottawa to a branch of the Bank of England, and the libelant was advised that credit was opened for it by the Bank of England in London about August 20th. The figures in connection with the forwarding of the gold have been given in answer to the previous interrogatory.

Verification by Max May, vice-president, February 20, 1915.

Filed February 23, 1915.

Interrogatories of Claimant and Answers of Guaranty Trust Co. 137

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY,
Libelant,

against

STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD,
Claimant.

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Further Answers to Interrogatories put forward in Claimant's Answer.

A. The following cables were sent by the libelant from New York to the Guaranty Trust Company at London on the indicated dates: 139

July 27, 1914. Insure at forty-five cents, $5,000,000 bar gold *Cecilie*, reply by cable immediately.

July 28, 1914. Bar gold your offer accepted also Bank of England offer for advance. You must insure £600,000 balance *Cecilie* Gold.

August 3, 1914. *Cecilie* gold are bringing pressure to bear from Washington, consider it advisable English Government also take steps recovery of gold. We have also cabled Deutsche Bank Berlin, Hamburg and Bremen to use their good offices with German Government. 140

Aug. 3, 1914. North German Lloyds report *Cecilie* at Bar Harbor, Maine.

Aug. 5, 1914. As yet have been unable to obtain gold *Cecilie* in absence of bill of lading expect to have one copy tomorrow. Doubt if

we can reship to England because of inability secure war risk will Bank of England be satisfied to have gold bars deposited United States Treasury as custodian for Bank. Advice by cable of such deposit to be given direct by United States Treasury to Bank.

Aug. 5, 1914. Immediately upon receipt by you of *Carmania's* mail deliver bill of lading covering shipment of gold by *Cecilie* to Keller Bryant & Co. 2 King William Street to be held for our account subject to delivery of gold to us here advise by cable.

Aug. 6, 1914. We have experienced delay and difficulty obtaining possession *Cecilie* gold owing her seeking harbor of refuge. Expect delivery gold here Monday. We hereby engage to reship London this *Cecilie* gold on first American or English liner available. Can you procure war risk. Presume this definite engagement of ours will be sufficient for Bank of England to continue advance *Cecilie* Gold. Would prefer if possible gold would be deposited with United States Treasury here account Bank of England.

Aug. 6, 1914. *Cecilie* Gold cable us in what company gold is insured also give us name New York Agents from whom we could obtain copy of policy similar to one you use so we may study terms.

Aug. 7, 1914. *Cecilie* Gold have made arrangements to transfer Bar Harbor to New York but North German Lloyd will not release gold on arrival gold here until duplicate bill of lading surrendered to their London Agent. Duplicate evidently on *Savoie* Wire us when

Interrogatories of Claimant and Answers of Guaranty Trust Co.

received and delivered. Will make arrangements at once and now agree to deliver when released Canadian Finance Minister Canada Gold Cecilie account Bank of England at £3.17.6—in Canada. Presume Bank of England will instruct Canadian Finance Minister direct. Does this close deal? 145

Aug. 8, 1914. We are arranging for delivery of *Cecilie* gold in New York Monday next to terminate risk of loss steamship company refuses to bear expenses and risk of delivery and we shall have to assume same we assume your policy covers same and shall expect our underwriters to protect us, obtain their approval. Underwriters for City Bank shipment are pursuing same course. 146

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B. The following cables sent by the London office on the indicated dates were received by the libelant at New York:

July 27, 1914. Have issued £400,000 Bar Gold *Cecilie* too late to-night to do more underwriters gone for the day.

July 27, 1914. Bar Gold too late to-night will telegraph to-night.

July 28, 1914. *Cecilie* $5,000,000—Bar Gold Bank of England offer us £3.17.9—and they will advance us £1,000,000—July 29th for one week 2½% against securities held by Guaranty Trust Company, London, New York Lake Shore & Michigan Southern yours and ours, etc. Offer firm for reply by telegraph 5 p. m. to-day our time strongly recommend your acceptance. 148

149 *Interrogatories of Claimant and Answers of Guaranty Trust Co.*

July 28, 1914. *Kronprinzessin Cecilie* presume you have insured balance £600,000 in New York reply by cable in time to be received this afternoon.

July 28, 1914. Have received your cable Bar Gold Bank of England July 29th advance arranged.

150 July 28, 1914. Received your cable after close of business hours have covered only £74,000 to-night additional average £1.3.2—per cent without war risk. Think could cover war risk £4/—per cent in addition reply by cable. May be able to cover £50,000 more July 29th but underwriters have sufficient. *Cecilie* first £400,000 includes war risk uncovered balance you must insure in New York.

July 29, 1914. Too late to-night, referring to

151 your cable to definitely arrange extension of *Cecilie* loan to arrival of *Carmania* but feel practically certain can arrange extension of £700,000 of the £1,000,000.

July 30, 1914. Referring our latest cable July 29th add and your daily deducting £300,000 for discountable bills already credited your account which are being financed for Guaranty Trust Company London in *Cecilie* loan till *Carmania* arrives. When these bills will

152 require to be again refinanced for Guaranty Trust Company London reply by cable do you understand. Have arranged now with the Bank of England on arrival of *Cecilie* Gold to continue £1,000,000 loan till *Carmania* Gold arrive.

Aug. 3, 1914. Cecilie not delivering Plymouth consulted American Embassy last Friday what could be done if this occurred, they re-

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plied nothing before arrival in German Port consulted Embassy again to-night after definite news non-delivery Plymouth they said inform British Admiralty facts which I did with chief cashier Bank of England Admiralty were aware but could do nothing said *Cecilie* was reported North of Ireland to-day

154

Embassy asks me cable you take up matter immediately with Washington.

Aug. 3, 1914. *Cecilie* did not deliver Plymouth I cabled Hemphill two a. m. to-day London time to take up non-delivery immediately with Washington. Cable receipt of this message immediately as British censorship is delaying cablegrams.

Aug. 3, 1914. Referring cable Gold two million dollars presume not insured under our pol-

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icy moratorium may be law by Friday. Will cable when details arranged and bill legal. Keep us fully informed Washington negotiations about *Cecilie*. Hope German Government will reship quickly. Will be here notwithstanding holidays.

Aug. 4, 1914. *Cecilie* now at Falmouth arranging transfer of shipment to London cable immediately receipt of this cable.

156

Aug. 4, 1914. Fear *Kronprinzessin Cecilie* reported not our one will cable after.

Aug. 5, 1914. *Cecilie* English Government kept fully informed. Foreign Office advise Lloyds report *Cecilie* returned to Bar Harbor, Maine cable confirmation.

Aug. 5, 1914. *Cecilie* when may Bank of England expect delivery.

Aug. 7, 1914. Have seen Bank of England tonight re continuation *Cecilie* loan pending re-

157 *Interrogatories of Claimant and Answers of Guaranty Trust Co.*

ceipt gold decision will be given to-morrow morning. Your remittances up to *LaSavoie* will almost certainly be in moratorium expected to-night but by continuation *Cecilie* loan if granted we could pay all your advised drawings up to *LaSavoie*.

158 Aug. 7, 1914. *Cecilie* your cable regarding Treasury proposition had arrived long after my cable about continuation *Cecilie* loan was despatched. Believe deposit your side at this time might be unsuitable, will enquire tomorrow; why cannot shipment shortly come by American Line cable immediately.

Aug. 7, 1914. Arranged continuation of *Cecilie* Loan Bank of England on definite offers will likely buy outright eagles at £3.16/-½ bars
159 £3.17.6. When deposited with Canadian Finance Minster in Canada when London payment will be made less small items like cablegrams cost transit New York Canada for your account. Make us offers. Would you accept £3.17.6 for *Cecilie* gold deposited in Canada. Her duplicate bill of lading apparently on *LaSavoie* not yet arrived is this so.

160 *C.* The libelant sent to the Guaranty Trust Company of London, the following letter on the indicated date:

GUARANTY TRUST COMPANY OF NEW YORK,

140 Broadway.
New York, July 27, 1914.

Guaranty Trust Company, of New York, London.

Dear Sirs:

We confirm our cables of to-day, advising you

Interrogatories of Claimant and Answers of Guaranty Trust Co.

that we are shipping you (per S/S *Kronp. Cecilie*) gold bars, amounting to $4,942,937.64.

We note from your reply that you will telegraph us what you can obtain for same to-morrow.

We also note that you have covered insurance, amounting to £400,000—and trust that you will be able to cover the balance to-morrow.

You will find enclosed herein the relative bill of lading covering 93 kegs No. 1 to 93—Kegs No. 1 to 90 inclusive containing 5 bars, kegs No. 91 and 92, 4 bars, and keg No. 93, 3 bars.

On arrival of this shipment, please cable us the amount realized and credited to our Sterling account; also the amount charged to our Sterling account for insurance and other charges.

Yours truly,

(Sgd) .....

Assistant Manager.

The foregoing cables and letter are the only correspondence of which we have any record.

CONVERS & KIRLIN,
Proctors for Libelant.

Verification by Max May, vice-president, March 2, 1915.

Filed March 4, 1915.

A motion was made for the sale of the vessel but was denied on February 10, 1915, without prejudice to its renewal, the claimant agreeing to pay one-half of the charges incurred through the vessel remaining in the custody of the marshal.

To the Honorable James M. Morton, Jr., United States District Judge, for the District of Massachusetts:

The libel of Charles W. Rantoul, Jr., against the steamship *Kronprinzessin Cecilie,* her engines boilers, tackle, apparel and furniture, in a cause of contract, civil and maritime, alleges on information and belief as follows:

FIRST: At all the times hereinafter mentioned, the libelant Charles W. Rantoul, Jr., was and still is a resident of the County and State of New York, in the Southern District of New York.

SECOND: The steamship *Kronprinzessin Cecilie*, is a German vessel owned by the North German Lloyd, a corporation existing under the laws of the Empire of Germany. The steamship is now, or, during the pendency of this process, will be in the harbour of Boston within this district. At the times hereinafter mentioned the *Kronprinzessin Cecilie* was operating as a common carrier of passengers and cargo between the ports of New York City, in New York, Plymouth, in England, Cherbourg, in France, and Bremen, in Germany.

THIRD: On July 27th, 1914, the libelant went on board the steamship *Kronprinzessin Cecilie*

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then lying in the port of New York, and purchased from the steamship and paid for a passage from the port of New York to the port of Plymouth England.

FOURTH: In consideration of the passage money paid by the libelant, the owners of the steamship, by their authorized agents, undertook to transport the libelant on the steamship *Kronprinzessin Cecilie* from the port of New York to the port of Plymouth, England, on a voyage to start about 1 a. m., on July 28th, 1914. 170

FIFTH: Thereafter and about 1 a. m., on July 28th, 1914, the steamship *Kronprinzessin Cecilie* proceeded on her voyage from New York to Plymouth, England. The distance covered by the steamship, the conditions of weather from day to day, and the latitude and longitude, as ascertained at noon of each day, were announced to the passengers by the officers of the steamship as follows: 171

Abstract of Log.

July 1914	Miles	Lat. N	Long. W.	Remarks
28	196	40° 10′	69° 35′	Overcast; rainy; light sea.
29	535	40° 10′	57° 55′	Cloudy; moderate sea. 172
30	534	40° 15′	46° 22′	Cloudy; hazy; moderate sea.
31	549	45° 25′	35° 36′	Cloudy; moderate sea.

Distance till noon 1814 miles.

173 *Libel of Rantoul.*

About 10:15 p. m., on Friday, July 31st, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth. She then turned back on her course, abandoning the voyage to Plymouth and proceeded toward the United States.

SIXTH: About 10:30 p. m., on the evening of July 31st, Charles Polack, the master of the
174 steamship, entered the smoking room of the steamship and announced to the passengers who were there assembled that he had just received a wireless message from his owners informing him that war had been declared between Germany, Russia, France and England, and instructing him to return at once to America. He also said that the steamer had already turned around and was proceeding back to America.

175

SEVENTH: The action of the master in turning the vessel on her course and proceeding back to America was taken pursuant to the instructions received by him from his owners, as hereinabove set forth.

EIGHTH: Thereafter the steamship *Kronprinzessin Cecilie* continued on her way toward the United States and arrived and anchored at Bar
176 Harbor, Maine, on the early morning of August 4, 1914, and was ordered by her owners to remain there indefinitely.

NINTH: In fact, war had not been declared and did not exist between Germany, Russia· England and France, on July 31st, nor between any two of those countries or governments. The first declaration or state of war took place between

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Germany and Russia on August 1st. War was declared between England and Germany on August 4th, about 11 p. m., and a state of war between Germany and France began about the same time. England, France and Russia are not and have not been at war with one another at any time in the year 1914.

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TENTH: If the steamship *Kronprinzessin Cecilie* had not turned back on her course on July 31st, and had proceeded on her voyage to Plymouth, she would have arrived at Plymouth, in ordinary course during the afternoon of Sunday, August 2nd, and would have discharged her passengers for that port on the same day.

ELEVENTH: The instructions by the owners of the *Kronprinzessin Cecilie* to the master, on July 179
31st, to proceed back to America at once, were wrongful and improper. The action of the master in turning the steamship on her course and proceeding back toward America constituted a wrongful deviation and abandonment of the voyage and a breach of the contract between the libelant and the owners of the steamship.

TWELFTH: By reason of the premises, the libelant has been damaged in the sum of Five 180
thousand dollars. Payment of this sum has been duly demanded of the owners of the *Kronprinzessin Cecilie* by the libelant but has been refused and no part thereof has been paid and the said sum still remains wholly due and unpaid and owing from the owners of the steamship to the libelant.

181 *Libel of Rantoul.*

THIRTEENTH: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREORE, libelant prays that process in due form of law may issue against the steamship
182 *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, and that all persons having or claiming any interest therein, be cited to appear and answer in the premises and the interrogatories hereto annexed, and that a decree be entered herein, against the *Kronprinzessin Cecilie* in favor of the libelant for the amount of his damages and costs, and that the said steamship be condemned and sold to pay the libelant's claim, or that the Court will grant to the libelant
183 such other or further relief as the justice of the cause may require.

CHARLES W. RANTOUL, JR.

Sworn to before me this 13th day of October, 1914.

CLETUS KEATING,
[SEAL] Notary Public, 2068,
New York County.

184 CONVERS & KIRLIN,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libelant.

Filed October 21, 1914.

[Claim was filed to the vessel on November, 1914, in similar form to the claim in the suit of the Guaranty Trust Co. *ante* p. 6.]

Answer to Libel of Rantoul. 185

To the Honorable James M. Morton, Jr., United States District Judge for the District of Massachusetts:

The answer of North German Lloyd, owner and claimant of the steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, to the libel of Charles W. Rantoul, Jr., in a cause of contract, civil and maritime, alleges as 186 follows:

I.

It denies any knowledge or information except by said libel as to the residence of libelant.

It admits the matters alleged in the *Second* Article of said libel.

It admits the matters alleged in the *Third* article of said libel, except that it denies that libelant's port of destination was Plymouth and alleges that in fact libelant purchased a ticket to Cherbourg, France. 187

It denies that the owners of the steamship, *Kronprinzessin Cecilie*, undertook to transport the libelant on said steamship from the port of New York to the port of Plymouth, England, and alleges that the port of destination agreed upon was Cherbourg, France. It admits that unless unforeseen circumstances should prevent, the 188 steamship was to set sail early in the morning of July 28th, 1914, but in that behalf it alleges that it did not directly or through its agents agree to transport the said libelant to the said port of Cherbourg absolutely or at all events, but in accordance with the provision of a certain passage ticket which was issued by claimant and accepted by libelant as the contract of carriage covering

189 *Answer to Libel of Rantoul.*

the voyage in question, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of a European war.

It admits that the allegations contained in the *Fifth* article of the libel are substantially true, except that it denies that the latitude of said
190 steamship as ascertained at noon of July 30th, 1914, was announced to the passengers as 40° 15′ N, and in that behalf it alleges that at such time the latitude was in fact 40° 45′ N, and on information and belief that it was so announced; except also that it denies that at about 10:15 P. M. on Friday, July 31st, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth or that at that time she turned back
191 on her course or abandoned the voyage to Plymouth and proceeded to the United States, and in that behalf it alleges that on said night said steamship turned back on her course at 10:09 P. M. and that her distance from Plymouth was then 1070 miles or more.

As the allegations contained in the *Sixth* article consist merely of a statement of alleged conversations in the smoking room of said steamship
192 and do not include any allegation of a material fact, claimant neither admits nor denies said allegations but leaves the libelant to make such proof thereof as he may be advised.

It admits that the action of the master in turning the vessel on her course and proceeding back to America was taken in concurrence with instructions received from his owners, and alleges that in taking such action, the master exercised a sound judgment and discretion with reference to the

welfare of the passengers and crew and the best interests of the ship and cargo owners. 193

It admits the matters alleged in the *Eighth* article of the libel, except that it denies that said steamship was ordered by her owners to remain at Bar Harbor indefinitely.

It admits that war had not been declared between Germany, Russia, England and France nor between any two of the said countries or governments on July 31st, but it alleges that on said day Germany was, by Imperial proclamation, declared to be in a state of war, and that a state of war did exist between Germany and Russia although formal declaration thereof was not made until August 1st. It admits that war was not formally declared between England and Germany until August 4th, although before said date various unfriendly acts had been committed by each of said countries against the other. It denies that a state of war between Germany and France began on or about August 4th, and in that behalf it alleges that on account of the treaty relations existing between France and Russia, a war with the former power became inevitable in the event of hostilities with the latter, and that in fact a state of war actually existed between France and Germany at or about the same time as the commencement of a state of war between Germany and Russia. 194 195 196

It denies on information and belief that the steamship *Kronprinzessin Cecilie*, if she had not turned back on her course on July 31st and had proceeded on her voyage to Plymouth, would have arrived at Plymouth in ordinary course on the afternoon of Sunday, August 2nd, or that she would have discharged her passengers for that

197 *Answer to Libel of Rantoul.*

port on that day, and in that behalf it denies any knowledge or information as to whether said steamship would ever have arrived at said port.

It denies all and singular the matters alleged in the *Eleventh* article of the libel.

It denies that by reason of the premises contained in said libel the libelant has been damaged
198 in the sum of Five thousand ($5,000) Dollars, or in any other amount whatsoever. It admits that payment of this sum has been demanded by the libelant of the owners of said steamship, but it denies that said demand was a due demand or made in the manner or in the time prescribed by the contract of carriage. It admits that said demand was refused and that no part of said sum has been paid, but denies that said sum or any part thereof is due and owing from the owners
199 of said steamship to the libelant.

It admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

II.

Further answering the libel, claimant says that its said S. S. *Kronprinzessin Cecilie* was built in the year 1907 at a cost of about $4,500,000; that
200 at the time of the voyage hereinafter described she was fully fitted, manned and equipped and had a full complement of officers and crew amounting in all to 650 men, all the officers and most of the crew being German subjects.

On July 28th, 1914, the *Kronprinzessin Cecilie* sailed from the port of New York having on board 1048 passengers, of various nationalities most of them Germans, and gold bullion or bars and gold coin of the declared value of $10,769,545.36, and

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bar silver of the declared value of $389,846.34, consigned to London and Paris via Plymouth and Cherbourg respectively. The gold and silver consigned to London were of the total declared value of $6,394,502.87, while the gold consigned to Paris was of the total declared value of $4,764,888.83. In addition to this specie, the ship carried mixed cargo consigned to German consignees at Bremen, 202
of which the total value was $139,335.

The shipment of this large amount of specie on one of the most valuable vessels afloat was given great publicity and was the subject of repeated comment in the public press of this country and Europe, and the captain of the *Kronprinzessin Cecilie* had good reason to believe that the cruisers of Russia, France and Great Britain would make every effort to capture so rich a 203
prize.

While said steamship was proceeding on her voyage a general war broke out in Europe in which Germany was involved, of which the master was informed by a wireless message from her owners at Bremen, and owing to the danger of capture if she proceeded on her voyage, on the evening of July 31, 1914, when the *Kronprinzessin Cecilie's* position was 46° 46′ N and 30° 21′ W. longitude from Greenwich, which was 1070 204
miles or more from Plymouth, or more than two days' journey, she turned back on her course and returned to this country, and on August 4, 1914, put into Bar Harbor, Maine. Claimant thereupon paid the cost of the libelant's transportation from Bar Harbor to New York and repaid to the libelant the passage money which it had received from him.

205 The return of the *Kronprinzessin Cecilie* to a port of the United States was not only a justifiable precaution, but was based upon reasonable ground for apprehension of capture and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew and to the cargo owners, and was a measure adopted by him in good faith in the exercise 206 of his best judgment and discretion for the benefit of all concerned. A large part of her cargo was destined for France and Germany, and even if the ship had succeeded in reaching Plymouth, England, and, after discharging her English bullion and passengers in leaving that port without interference by the English authorities, she would have been in a most critical position with reference to the hostile fleets. A state of war ex- 207 isted between Germany and France and Russia before the date on which she could have arrived in due course at Plymouth or Cherbourg, and even if she could have eluded the watchfulness of French cruisers, upon her arrival at Cherbourg, she would have been seized by the French authorities. In such circumstances it was impossible to reach Bremerhaven, her port of final destination, by passing through the English Channel 208 and running the gauntlet of both French and British fleets. The Russian fleet, whose position was unknown to the captain of the *Kronprinzessin Cecilie*, was an additional factor which was necessarily considered by him in making his decision. The only other course she could have pursued was to make directly for Bremerhaven without touching at any English or French port, in which event, if she had reached Bremerhaven without capture, although the ship herself would

have been safe, the specie consigned to France and England would have been seized by the German government.

Before the *Kronprinzessin Cecilie* commenced her return voyage the sailings of ships from German ports had been cancelled, traffic in the North Sea had been suspended, one or more English ports had been closed, the great powers had commenced a general mobilization of their land and sea forces, the channel service between England and France had been interrupted, a German merchantman had been captured by Russian cruisers, British ships had been forcibly detained in German ports and some of them had been compelled to discharge their cargoes, by Imperial proclamation Germany had been declared in a state of war and German vessels in all parts of the world had been ordered to seek or remain in neutral ports. 210 211

The wireless message to the *Kronprinzessin Cecilie*, referred to in the libel, was withheld by the North German Lloyd office until the last possible moment and until it was apparent that if she were permitted to proceed further she would not have sufficient coal to reach a port of refuge. As it was, when she arrived at Bar Harbor, there remained in her bunkers only 450 tons.

The action of the captain in directing the return of said steamship to the United States where the rights of all those interested in both ship and cargo would be respected and protected was in concurrence with the instructions received from her owners as contained in the wireless message aforesaid and such instructions and the action following them were fully justified by the circumstances and were the exercise of a right given by the laws 212

of the United States as well as by Article 634 of the Maritime Code of the German Empire which provides in substance that if a war be declared after the commencement of a voyage in consequence of which a vessel or the goods shipped thereon can no longer be considered free and would be liable to risk of capture, either party
214 has the right to withdraw from the contract without being liable to damages, and by Articles 669 and 670 of said Maritime Code hereinafter more specifically referred to and by other provisions of the German Law.

The course pursued by the captain was entirely successful and his return to a port of refuge and the delivery of all the specie to the parties entitled thereto were accomplished without the capture or detention of a single passenger or member
215 of the crew, and without loss of or damage to any of the specie or mixed cargo.

III.

Claimant further alleges that by the passage ticket, constituting the contract of carriage it was expressly provided that said steamship should have liberty to put back or into any port at the discretion of the commander and to deviate from the direct and customary course, and that the
216 action of the master of the steamship *Kronprinzessin Cecilie* in turning said ship and putting back into the port of Bar Harbor, Maine, was an exercise of the right thereby conferred.

IV.

Claimant further alleges that upon the arrival of said steamship in the United States, libellant abandoned said contract and elected to treat it as

cancelled by demanding and accepting the repayment of his passage money. 217

V.

Claimant further alleges that under the contract of carriage, it was understood by and between the libellant and the claimant that time should not be of the essence of the contract. 218

VI.

Claimant further alleges that the said contract of carriage expressly provided that no claim thereunder should be enforceable against the ship owner or his property or the agent or passage broker unless notice thereof in writing with full particulars of the claim should be delivered to the ship owner or agent within five days after the passengers should be landed from the transatlantic ocean steamer at the termination of her voyage or in case of the voyage being abandoned or broken up within ten days thereafter; that no such notice was given within either of the periods so specified. 219

Claimant further alleges that in the passage ticket constituting the contract of carriage covering the voyage in question it was expressly provided that all questions arising thereunder should be decided according to German Law; that Article 669 of the Maritime Code of the German Empire, which is embodied in the German Commercial Code and constitutes part of the German Law, provides as follows: 220

> "The passenger may withdraw from the passage contract, when, in consequence of a war breaking out, the vessel cannot any longer be considered as free, and would be ex-

221 posed to the risk of capture, or if the ship's voyage should be delayed by Government order.

The shipowner has likewise the right of withdrawal when, in either of the above cases he gives up the voyage or when the vessel is intended principally for the transport of goods, and the adventure cannot be under-
222 taken, because, without any fault on his part, such goods cannot be forwarded."

That Article 670 of said code provides, among other things, that in all cases in which, pursuant to said Article 669, the passage contract is dissolved, neither party is liable to damages.

Claimant further alleges that its withdrawal from the passage contract and the action of the
223 captain in turning the ship before the completion of her voyage and putting back into the port of Bar Harbor, Maine, as hereinbefore set forth, were the exercise of a right expressly conferred upon the shipowner by the articles above referred to and were entirely in accord with other provisions of the law of the German Empire.

Wherefore claimant prays that the libel may be dismissed with costs and that it may have such other or further relief as in justice it may be
224 entitled to receive.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

Verification by Wilhelm L. C. B. Siegel, November 27, 1914.

Filed December 1, 1914.

Interrogatories of Rantoul and Claimant's Answers. 225

UNITED STATES DISTRICT COURT.

DISTRICT OF MASSACHUSETTS.

CHARLES W. RANTOUL, JR.,
Libelant,

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AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, &c.
NORTH GERMAN LLOYD,
Claimant.

Interrogatories addressed to Owner and Claimant of the Steamship Kronprinzessin Cecilie, and the answers thereto. 227

First Interrogatory: If you say that the particulars set out in the Fifth article of the libel are incorrect, state in what respect you claim they are incorrect and, also, state the distance covered by the vessel as ascertained at noon of each day, the conditions of weather and the position of the vessel, so nearly as you can estimate it, 228 at about 10:15 P. M., on Friday, July 31st, 1914, or immediately prior to the turning back by the vessel on her course.

Answer: The ship left her pier at Hoboken on July 28th at 1 A. M. as stated.

The number of nautical miles traversed up to noon of each day is correctly given.

The latitude and longtitude at noon of each day are correctly stated, except that the latitude at

229 *Interrogatories of Rantoul and Claimant's Answers.*

noon on July 30th should read 40° 45′ N, instead of 40° 15′ N.

The latitudes and longtitudes given in the libel are:

July 1914	Miles	Lat. N	Long. W	Remarks
230 28	196	40°10′	69°35′	Overcast; rainy; light sea
29	535	40°10′	57°55′	Cloudy; moderate sea
30	534	40°15′	46°22′	Cloudy; hazy; moderate sea
31	549	45°25′	35°36′	Cloudy; moderate sea.

Distance till noon 1814 miles.

The condition of the weather each day, as given, is substantially correct, being:

July 28. Cloudy, rain. Light moderate sea.

July 29. Cloudy, light moderate sea.

July 30. Covered and cloudy, hazy, light
231 moderate sea.

July 31. Cloudy, light moderate sea.

The ship did not turn back on her course at 10:15 P. M., ship's time on Friday, July 31st, but at 10:09 P. M., ship's time, on that date and she was then 1,070 nautical miles or more from Plymouth, England, her position being 46°46′ N, 30° 21′ W.

Second Interrogatory:

232 (a) On what day and at what hour did the steamer turn back on her course from New York to Plymouth?

(b) What was her course and what was her latitude and longitude at the time the change was made?

(c) What was her course after the change was made?

(d) What was the distance from Plymouth at the time the change was made?

Interrogatories of Rantoul and Claimant's Answers. 233

Answer:

(a) The ship turned back on her course from New York to Plymouth on July 31st, 1914, at 10:09 P. M., ship's time.

(b) Her course then, before turning, was East by North ½N. Her position was 46°46′ N, and 30° 21′ W. 234

(c) Her course after turning was West ¾S.

(d) The distance from Plymouth at the time she turned back on her course was 1,070 nautical miles or more.

Third Interrogatory: If you say that the particulars stated in the sixth article of the libel are incorrect, specify in what respects you claim them to be incorrect and state fully what you claim the captain announced to the passengers in the smoking room of the steamship, on the evening of 235 July 31st, 1914.

Answer: It was at about 10:15 ship's time on July 31st, and not 10:30 P. M. ship's time on that date, that Charles Polack, the master of the steamship, entered the smoking room of the first cabin. He then informed the passengers therein that he had received from his company a message that war had broken out with Russia, France and England and that the ship would return to New 236 York. He added that she had already turned about.

Fourth Interrogatory:

(a) If you say, in answer to the seventh article of the libel, that the action of the master, in turning the vessel on her course and proceeding back to America, was not taken pursuant to instructions received by him from the owners of the ves-

sel, state why he did have the vessel turn on her course and proceed back to America.

(b) On what information did the captain act in directing the change to be made?

(c) On what day and hour and in what manner was such information received by the master and
238 from whom did it come?

(d) If the information was in the form of a wireless message, state just what the language of the message was and, if it was transmitted in German or in code, give a translation.

Answer:

(a) The action of the master in turning the vessel on her course and proceeding back to America was taken in concurrence with instructions received by him from the owners of the ves-
239 sel and also in the exercise of his sound judgment and discretion with reference to the welfare of the passengers and crew and the best interests of the ship and cargo owners.

(b) The captain acted on the information contained in the wireless message received from his company and on the information relating to the European crisis which he had received before sailing.

240 (c) The message was received on July 31st at 10 P. M. ship's time or 11:45 P. M. Greenwich time, by wireless from his company at Bremen, Germany.

(d) The language of the message was in the private code of the company, a correct translation of which is as follows:

> "War has broken out with England, France and Russia. Turn back to New York. (Signed) Managing Board of North German Lloyd."

Interrogatories of Rantoul and Claimant's Answers.

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The code words are not given as libelant's proctors have stated that they would not require it.

Fifth Interrogatory:

(a) Did the master receive any wireless message from the owners, or their agents, after the vessel had sailed from New York, on July 28th, 1914, and until her arrival at Bar Harbor, on August 4th? If so, give the contents of each message and if the message was transmitted in German, or in code, give a translation.

242

(b) Did the master send any wireless messages to the owners of the vessel, or their agents, after the vessel sailed on her voyage from New York, on July 28th, 1914? If so, state the contents of all such messages and, if they were transmitted in German, or in code, give a translation.

243

(c) Previously to the departure of the vessel from New York on July 28th, 1914, had the master received any instructions from the owners, or their agents, in connection with the voyage that he was about to make and dealing in any way with possible interruption, deviation or abandonment of the voyage? If so, state fully what the instructions were and if they were in writing annex a copy and if they were in German, or in code, give a translation.

244

Answer:

(a) The master received no wireless message from the owners, or their agents, after the vessel had sailed from New York on July 28th, 1914, and until her arrival at Bar Harbor on August 4th, excepting:

(1) The wireless message above mentioned, received on July 31st at 10 P. M. ship's time, or

245 *Interrogatories of Rantoul and Claimant's Answers.*

11:45 Greenwich time, when the ship's position was 46° 46′ North, 30° 21′ West.

(2) The following wireless messages intercepted by the steamer, which had been sent out by Oelrichs & Co., the general agents at New York, to other steamers of the company were
246 intercepted on August 1st, between 11 and 12 P. M. ship's time, or 9 to 10 P. M. Standard time, when the ship's position was 45° 26′ N. 44° 55′ W.

New York: Captain SS *Neckar* WSL/ return immediately to Galveston or any U S port acknowledge these Orders/ Oelrichs & Co.

New York: Captain SS *Willehad* WSL/ Return Boston immediately acknowl-
247 edge these orders/ Oelrichs & Co.

New York: To Captain *Friedrich der Grosse* WSL/ Return New York immediately acknowledge these orders/ Oelrichs & Co.

New York: Captain *Grosser Kurfuerst* WS L/ Return New York immediately acknowledge these orders Oelrichs and Co.

248 (3) An exact repetition of the wireless message referred to in Subdivision (1) supra, which was received on August 2nd, at 11 P. M. Standard time or 12:03 ship's time of August 3rd by way of Sayville, when the ship's position was 44° 3′ North, 55° 27′ West.

(b) The master sent no wireless messages to the owners of the vessel, or their agents, after the vessel sailed on her voyage from New York on July 28, 1914, until the vessel had returned to Bar

Harbor, when the messages referred to in the answer to the Sixth Interrogatory were sent.

(c) Prior to the departure of the vessel from New York on July 28th, 1914, the master had received no instructions from the owners, or their agents, in connection with the voyage that he was about to make, dealing in any way with possible interruption, deviation or abandonment of the voyage.

Sixth Interrogatory: Did the master exchange communications in any way with the owners, or their agents, after the arrival of the vessel at Bar Harbor on August 4th, 1914? If so, annex copies of all such communications that he received or sent. State from whom they were received or to whom they were sent, and if they were in German, or in Code, give a translation.

Answer: The following are the communications exchanged between the master and the owners or their agents, after the arrival of the vessel at Bar Harbor on August 4th, 1914:

(1) A wireless message sent by the master to the Company's Inspection at Hoboken, New Jersey, a translation of which is as follows:

"August 4th, 5:20 A. M. ship's time or 4:08 A. M. Standard time.

Inspection,

Hoboken, New Jersey,

Kronprinzessin Cecilie arrived all well Bar Harbor Await instructions what to do with passengers and specie. Advise Bremen.

Polack."

The German text of this message is hereto annexed marked "A".

[It is printed in the Answers to Interrogatories in suit of Guaranty Trust Co., *ante* p. 26].

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(2) The following messages exchanged between the master and the company's agents in relation to the landing of passengers, shipment of cargo and delivery of mail and specie:

"Bar Harbor, Maine Aug. 5, 1914.

Oelrichs and Co

254 5 Broadway N Y

Majority of cabin passengers left here yesterday on trains at three six and nine o'clock others leaving three this afternoon. Ascertain Grand Central time of arrival Post office officials on board state they have no instructions regarding mails. What shall be done regarding landing and forwarding of steerage Latter are getting impatient Also wire instructions regarding specie.

Polack (Muhlenbrock)"

255

"August 5/14

Captain Polack

Steamer *Kronprinzessin Cecilie*

Bar Harbor, Maine

Instructions regarding removal mail is under jurisdiction Post Office Latter inform us officials on board are to await word from Superintendent Railway Mail Service of Boston Latter having full

256 charge mail stop you must await our instructions regarding Specie.

Oelrichs & Co"

"August 5/14.

Captain Polack,

Steamer *Kronprinzessin Cecilie*,

Bar Harbor, Maine

Call me up on telephone at one o'clock tomorrow Thursday afternoon.

von Helmolt."

Interrogatories of Rantoul and Claimant's Answers.

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"Aug. 6, 1914.

Capt. Polack,
Steamer *Kronprinzessin Cecilie,*
Bar Harbor, Maine.

Gerding from Pier as also Inspectors from Boston will take charge deported passengers,— if Gerding will instruct Doctor Barnes Sanitorium Stamford, Conn., when train due Barnes will have attendants at Stamford station to receive insane cases,— 258

Oelrichs & Co."

"8, 8, '14.

Captain Charles Polack,
Steamer *Kronprinzessin Cecilie,*
Bar Harbor, Me.

Have sufficient number of your men placed at disposal of American Express Company at Mount Desert to assist loading into cars. Inform us number and time engaged. If possible have all gold and silver on docks by ten A. M. 259

Oelrichs & Co."

(Inspection, Hoboken to Capt Polack)
Aug. 4.

Congratulations for safe return. Have cabled Bremen. Oelrichs are arranging with Collector of Port at Portland regarding passengers and baggage. Have cabled Bremen for instructions regarding specie (contanden). Arrange for complete coaling immediately. 260

(From Capt. Polack to Inspection, Hoboken)
Aug. 5.

No coal obtainable here. Send barges with chutes and beams. Will take in coal with own crew. Thank you for congratulations.

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(From Inspection, Hoboken to Capt. Polack)

Aug. 4.

Wire immediately how many tons of coal you have on board now. Expect Knewnick.

(From Capt. Polack to Inspection, Hoboken)

Aug. 5.

262 Coal, rest 450 tons.

(From Inspection, Hoboken to Capt. Polack)

Aug. 7.

Hold paupers and insane on board until arrival of Gerding tomorrow noon.

Aug. 12.

Seal hatches if possible to relieve custom house officers.

Aug. 12.

263 Will send 10,000 pounds of beef from here tomorrow. Do you require any other meat or provisions to fill car. Reply immediately.

(Capt. Polack to Inspection, Hoboken)

Aug. 16.

Coal barges alongside at 11 o'clock this morning.

(Inspection, Hoboken to Capt. Polack)

264 Aug. 20.

Ship if possible from ship's stores 60 boxes oranges and rest grapefruit per cargo barge New York.

(From Capt. Polack to Inspection, Hoboken)

Aug. 22.

Coaling finished at 1 P. M. today. Just working four days. Weight correct. Begin discharging cargo immediately. Hope finish tomorrow 10 A. M.

Interrogatories of Rantoul and Claimant's Answers.

(From Inspection Hoboken to Capt. Polack)
Aug. 22.

To whom did you deliver embassy dispatch pouch. Post-office claims they did not receive it.

(From Capt. Polack to Inspection, Hoboken)
Aug. 22.

Bag not found. Only have two, one embassy one consulate.

(3) A report made by the master to the Home Office of the Company at Bremen, Germany.

[This is the report given in the answer to the Fourth Interrogatory in libel of the Guaranty Trust Company, *ante* p. 26].

Seventh Interrogatory:

(a) If in answer to the tenth article of the libel, you state that the vessel would not have arrived at Plymouth in ordinary course during the afternoon of Sunday, August 2nd, 1914, and would not have discharged her passengers for that port on the same day, state when in your opinion the vessel in ordinary course would have arrived at Plymouth and discharged her passengers for that port, if she had not turned back on her course on July 31st.

(b) What is the basis of your estimate of your previous answer?

Answer:

(a) The steamer on this trip would certainly not have reached Plymouth, England, until after 12 P. M. Greenwich time, on Sunday night, August 2nd, and would not have landed her passengers and the specie until the morning of August 3rd at about 6 A. M., Greenwich time.

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(b) The basis of this estimate is that the vessel was 1,070 miles or more from Plymouth when she turned back on her course on July 31st at 10:09 P. M. ship's time, which was slightly after 11:45 P. M. Greenwich time. In addition to this the possible presence of enemy cruisers is to be
270 reckoned with, and there was considerable marine growth on the bottom of the ship, and notwithstanding the aid of the Gulf Stream, she did not run especially well.

Eighth Interrogatory:

(a) Give the day and hour of the sailing of the vessel from the port of New York and of her arrival at Plymouth for a period of one year prior to July 20th, 1914.

271 (b) Give a short abstract of the vessel's log on those voyages as published in the Ocean Gazette, on board the Steamship *Kronprinzessin Cecilie*, on the voyages in question, giving similar details to those set forth in the fifth article of the libel.

Answer:

(a) The time of sailing of the steamer from the port of New York and her arrival at Plymouth
272 on each trip for a period of one year prior to July 20th, 1914, is as follows:

Interrogatories of Rantoul and Claimant's Answers.

273

ne of Departure rom New York tandard Time)	Time of Arrival at Plymouth Roads (Greenwich Time)	Passage	Sea Miles Traversed
13.			
ne 10 10.14 a. m.	June 16 7.35 a. m.	5 d, 12 h,—m	3,097
ly 8 10.08 "	July 14 6.00 "	" 12 h,30m	3,101
g. 5 10.16 "	Aug. 11 6.12 "	" 12 h,36m	3,101
p. 9 10.13 "	Sep. 15 7.36 "	" 14 h,—m	3,004
t. 7 10.00 "	Oct. 13 5.51 "	" 12 h,12m	3,001
ov. 6 10.06 "	Nov. 12 9.51 "	" 16 h,12m	3,005
ec. 2 10.15 "	Dec. 8 9.00 "	" 15 h,30m	3,005
14.			
an. 20 10.21 a. m.	Jan. 26 8.24 a. m.	" 14 h,36m	3,002
eb. 21 7.02 "	Feb. 27 9.00 "	" 18 h,42m	3,103
Mch. 24 1.00 "	Mch. 30 4.00 "	" 19 h,—m	3,102
pl. 21 1.00 "	Apl. 26 11.54 p. m.	" 15 h,24m	3,103
May 19 1.00 "	May 24 10.12 "	" 13 h,36m	3,103
une 16 1.00 "	June 22 12.12 a. m.	" 15 h,36m	3,119
uly 4 1.00 "	July 9 11.12 p. m.	" 14 h,36m	3,119

274

275

(b) The following is an abstract of the vessel's log on each of the above voyages as published in the Ocean Gazette on board the Steamship *Kronprinzessin Cecilie,* and also on the voyage in question, with similar details to those set forth in the Fifth Article of the libel:

276

ABSTRACT OF LOG

Twinscrew Express Steamship *Kronprinzessin Cecilie* Captain Ch. Polack.

277 *Interrogatories of Rantoul and Claimant's Answers.*

June 1913	Miles	Lat. N.	Long. W.	Remarks.
10				Ambrose Channel lightvessel at noon Standard time.
11	523	40°20′	62°27′	Clear weather; light sea.
12	538	40 36	50 40	Clear weather; moderate sea.
278 13	557	43 50	39 23	Clear weather; light sea.
14	534	46 51	27 29	Cloudy; rough sea.
15	530	49 23	14 48	Cloudy; overcast; light sea.
16	415	Rest		Haze weather; light sea. Eddystone lighthouse at 7 a. m. Greenwich M. time.

Total distance: 3097 miles. Passage: 5 days, 14 hours, — minutes. Average speed: 23,11 knots.
Left Hoboken Pier: June 10. 10h 12 a. m.
279 Anchored Plymouth Roads: June 16. 7h 35 a. m.

Aug., 1913				
8				Ambrose Channel lightvessel at noon Standard time.
9	526	40°24′	62°23′	Clear weather; light sea.
10	553	40 29	50 16	Clear weather; light sea.
11	552	43 51	39 9	Cloudy; several passing showers of fog; light sea.
280 12	543	47 00	27 4	Overcast; light sea.
13	541	49 30	14 4	Cloudy; light sea.
14	386	Rest		Clear weather; light sea. Eddystone lighthouse at 5.30 a. m. Greenwich M. time.

Total distance: 3101 miles. Passage: 5 days, 12 hours, 30 minutes. Average speed: 23,40 knots.
Left Hoboken Pier: July 8, 10h 08 a. m.
Anchored Plymouth Roads: July 14, 46h 00 a. m.

Interrogatories of Rantoul and Claimant's Answers.

281

ug., 1913					
					Ambrose Channel light vessel at noon Standard time.
6	526	40°24′	62° 23′		Clear weather; light sea.
7	535	40 24	50 40		Cloudy; light sea and light westerly swell.
8	546	43 46	39 45		Cloudy; light sea.
9	556	47 22	27 34		Cloudy; passing showers of rain; light sea.
0	548	49 23	14	9	Cloudy; light sea.
1	390	Rest			Cloudy; light sea. Eddystone lighthouse at 5.36 a. m. Greenwich M. time.

282

Total distance: 3101 Miles. Passage: 5 days, 12 hours, 36 minutes. Average speed: 23,39 knots.
Left Hoboken Pier: Aug. 5. 10 h 16 a. m.
Anchored Plymouth Roads: Aug. 11 6 h 12 a. m.

283

Sept., 1913					
9					Ambrose Channel light vessel at noon Standard time.
10	502	41°36′	63° 6′		Cloudy; rough sea and NE swell.
11	519	42 51	51 33		Overcast; fogshowers; moderate sea and ESE swell.
12	522	46 30	40 36		Cloudy; moderate to light sea.
13	553	48 50	27 22		Cloudy; light sea and NW swell.
14	512	49 48	14 22		Cloudy; rough sea and high North swell.
15	396	Rest			Cloudy; rough sea and high North swell. Eddystone lighthouse at 7.00 a. m. Greenwich M. time.

284

Total distance: 3004 miles. Passage: 5 days, 14 hours, — minutes. Average speed: 22,42 knots.
Left Hoboken Pier: Septbr. 9. 10h 13 a. m.
Anchored Plymouth Roads: Septbr. 15. 7h 36 a. m.

285 *Interrogatories of Rantoul and Claimant's Answers.*

Octbr., 1913

7					Ambrose Channel lightvessel at noon a. m. Standard time.
8	505	41°18′	62°56′		Cloudy; light sea; 8 hours fog; reduced speed.
9	529	42 49	51 14		Cloudy; moderate sea.
10	549	46 21	39 26		Cloudy; rough sea.
11	526	49 02	27 02		Cloudy; rough sea and high
286					North swell.
12	525	49 53	13 38		Overcast; rainy; high and rough sea.
13	367	Rest			Overcast and cloudy; rough sea and South swell. Eddystone lighthouse at 5.12 a. m. Greenwich M. time.

Total distance: 3001 Miles. Passage: 5 days, 12 hours, 12 minutes. Average speed: 22,70 knots.

287 Left Hoboken Pier: Octbr. 7, 10h 00 a. m.
Anchored Plymouth Roads: Octbr. 13. 5h 51 a. m.

Nov., 1913

6					Ambrose Channel lightvessel at noon a. m. Standard time.
7	522	41°25′	62°35′		Clear weather; light sea.
8	531	42 57	50 50		Clear weather; light sea and North swell.
9	531	46 36	30 29		Cloudy; rough sea and North
288					swell.
10	478	47 54	27 55		Cloudy; high and rough sea. High NNE swell.
11	480	49 12	16 00		Cloudy; high and rough sea. High North swell.
12	463	Rest			Cloudy weather; rough to moderate sea. Eddystone lighthouse at 9.12 a. m. Greenwich M. time.

Total distance: 3005 Miles. Passage: 5 days, 16 hours, 12 minutes. Average speed: 22,06 knots.

Left Hoboken Pier: Novb. 6, 10h 6 a. m.

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Interrogatories of Rantoul and Claimant's Answers.

ec., 1913

2				Ambrose Channel lightvessel at noon Standard time.
3	511	41°14′	62 48′	Overcast; moderate sea and ESE swell.
4	458	42 52	52 46	Cloudy; rough sea, very high East swell, 10 hours reduc. speed.
5	538	46 16	41 24	Cloudy; rough sea and West swell.
6	522	48 40	29 02	Overcast; hazy, rough sea.
7	531	49 42	15 37	Overcast; hazy; moderate sea.
8	445	Rest		Overcast; hazy weather; light sea. Eddystone lighthouse at 8.30 a. m. Greenwich M. time.

290

Total distance: 3005 Miles. Passage: 5 days, 15 hours, 30 minutes. Average speed 22,18 knots.

Left Hoboken Pier: Decb. 2. 10h 15 a. m.

Anchored Plymouth Roads: Decb. 8. 9h 00 a. m.

291

Jan., 1914

20				Ambrose Channel light vessel at 12.12 p. m. Standard time.
21	511	41°13′	62°48′	Overcast; moderate to rough sea.
22	523	42 54	51 16	Overcast; rough sea.
23	524	46 21	40 06	Overcast; rough sea and high WNW swell.
24	510	48 50	28 03	Cloudy; moderate sea and high West swell.
25	509	49 48	15 07	Overcast; high sea and WSW swell.
26	425	Rest		Cloudy; rough sea and West swell. Eddystone lighthouse at 7.48 a. m. Greenwich M. Time.

292

Total distance: 3002 Miles. Passage: 5 Days, 14 hours, 36 minutes. Average speed: 22,30 knots.

Left Hoboken Pier: Jan. 20, 10h 21 a. m.

Anchored Plymouth Roads: Jan. 26. 8h 24 a. m.

293 *Interrogatories of Rantoul and Claimant's Answers.*

Febr., 1914

21				Ambrose Channel lightvessel at 8.42 a. m. Standard time.
21	73	40°20′	72°15′	Clear weather; moderate sea.
22	479	40 03	61 49	Cloudy; moderate sea and high ENE swell.
294 23	520	40 26	50 29	Overcast; rainy; light sea.
24	538	43 43	39 39	Cloudy; rainy; moderate sea.
25	527	47 15	28 11	Overcast; rough sea.
26	540	49 14	15 00	Overcast; moderate sea.
27	426	Rest		Overcast; hazy; moderate sea. Eddystone lighthouse at 8.24 a. m. Greenwich M. time.

Total distance: 3103 Miles. Passage: 5 Days, 18 hours, 42 minutes. Average speed: 22,37 knots.

Left Hoboken Pier: Febr. 21. 7h 02 a. m.

295 Anchored Plymouth Roads: February 27, 9h 00 a. m.

March, 1914

24				Ambrose Channel lightvessel at 3.00 a. m. Standard time.
24	197	40°10′	69°34′	Clear weather; light sea.
25	547	40 16	57 38	Clear weather; moderate sea.
26	537	40 53	46 00	Cloudy; rough sea.
27	503	44 42	35 50	Cloudy; high rough sea and high NW swell.
296 28	500	47 42	24 36	Cloudy; rough sea and WNW swell.
29	510	49 31	12 03	Overcast; rough sea.
30	308	Rest		Overcast; rainy; rough sea. Eddystone lighthouse at 3.00 a. m. Greenwich M. time.

Total distance: 3102 Miles. Passage: 5 Days, 19 hours, 00 minutes. Average speed: 22,32 knots.

Left Hoboken Pier: March 24, 1h 00 a. m.

Anchored Plymouth Roads: March 30. 4h 00 a. m.

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Interrogatories of Rantoul and Claimant's Answers.

297

ril, 1914

			Ambrose Channel lightvessel at 3.00 a. m. Standard time.
195	40°09′	69°36′	Clear weather; light sea.
526	40 18	58 07	Clear weather; rough sea.
536	40 54	46 40	Cloudy; moderate sea.
539	45 07	35 50	Cloudy; rough sea.
529	47 11	23 27	Cloudy; light sea.
529	49 45	10 35	Clear weather; light sea.
259	Rest		Clear weather; light sea.
			Eddystone lighthouse at 11.24 p. m. Greenwich M. Time.

298

Total distance: 3103 Miles. Passage: 5 Days, 15 hours, 24 minutes. Average speed: 22,92 knots.

Left Hoboken Pier: April 21. 1.00 a. m.

Anchored Plymouth Roads: April 26. 11.54 p. m.

299

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lay, 1914

9

			Ambrose Channel lightvessel at 3.00 a. m. Standard time.
9 195	40°10′	69°36′	Clear weather; light sea.
0 528	40 10	58 05	Overcast; moderate sea.
1 549	40 59	46 20	Overcast and hazy; smooth sea.
2 549	45 16	35 15	Overcast; light sea.
3 535	48 12	22 58	Cloudy; smooth sea.
4 537	49 51	9 34	Clear weather; light sea.
4 210	Rest		Cloudy; moderate sea.
			Eddystone lighthouse at 9.36 p. m. Greenwich M. Time.

300

Total distance: 3103 Miles. Passage: 5 Days, 13 hours, 36 minutes. Average speed: 23,23 knots.

Left Hoboken Pier: May 19. 1h 00 a. m.

Anchored Plymouth Roads: May 24. 10h 12 p. m.

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301 *Interrogatories of Rantoul and Claimant's Answers.*

June, 1914

16				Ambrose Channel lightvessel at 3.00 a. m. Standard time.
16	194	40°10′	69°38′	Clear weather; light sea.
17	547	40 10	57 42	Cloudy; moderate sea.
18	545	40 33	46 40	Overcast; rainy; moderate sea.
19	521	44 43	35 39	Cloudy; rough sea.
302 20	530	47 56	23 45	Cloudy; rough sea.
21	528	49 41	10 40	Clear weather; rough sea and NW swell.
21	254	Rest		Clear weather; light sea and NW swell. Eddystone lighthouse at 11.36 p. m. Greenwich M. Time.

Total distance: 3119 Miles. Passage: 5 Days, 15 hours, 36 minutes. Average Speed: 23,00 knots.

303 Left Hoboken Pier: June 16. 1h 00 a. m.
Anchored Plymouth Roads: June 22. 12h 12 a. m.

July, 1914

4				Ambrose Channel lightvessel at 3.00 a. m. Standard time.
4	196	40°10′	69°35′	Clear weather; smooth sea.
5	551	40 12	57 34	Clear weather; light sea.
6	551	40 48	45 56	Cloudy; light sea.
7	540	45 11	35 12	Cloudy; rough sea and West swell.
304 8	524	48 19	23 18	Clear weather; moderate sea.
9	532	49 40	9 57	Overcast; hazy; light sea.
9	225	Rest		Overcast; hazy; light sea. Eddystone lighthouse at 10.36 p. m. Greenwich M. Time.

Total distance: 3119 Miles. Passage: 5 Days, 14 hours, 36 minutes. Average speed: 23,17 knots.
Left Hoboken Pier: July 4. 1h 00 a. m.
Anchored Plymouth Roads: July 9. 11h 12 p. m.

Interrogatories of Rantoul and Claimant's Answers.

305

he following is a short abstract of the vessel's on the voyage in question, with similar details hose set forth in the Fifth Article of the libel:

y, 1914				Remarks
(noon)	196	40°10′	69°35′	Cloudy, rain. Light moderate sea.
"	535	40°10′	57°55′	Cloudy, light moderate sea.
"	534	40°45′	46°22′	Overcast and cloudy, hazy, light moderate sea.
"	549	45°25′	35°36′	Cloudy, light moderate sea.
(10.09 P. M.) (ship's time)	233	46°46′	30°21′	Turned around.

306

307

ug., 1914				
(noon)	306	46°09′	37°42′	Cloudy, light moderate sea.
"	523	44°56′	50°02′	Cloudy, light moderate sea.
"	501	42°58′	61°18′	Cloudy, light moderate sea.
(4.54 A. M.) Standard Time)	350	44°08′	68°13′	Passed Great Duck Island. End of sea voyage.

Anchored in Bar Harbor August 4th, 6 A. M. Standard Time.

308

Passed Ambrose Lightship July 28th, 3 A. M. Standard Time.

Exact duration of trip 7 days, 1 hour, 54 minutes.
Entire distance 3727 knots.
Average speed 21,94 knots.

NORTH GERMAN LLOYD,
By
OELRICHS & Co.,
General Agents.

Verification by W. L. C. B. Siegel November 27, 1915.

309 *Claimant's Interrogatories and Rantoul's Answers.*

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF MASSACHUSETTS.

CHARLES W. RANTOUL, JR.,
Libelant,

310

against

Steamship "KRONPRINZESSIN CECILIE," North German Lloyd,
Claimant.

Interrogatories Propounded to Libelant and his Answers.

311

First Interrogatory:

What was the object of your trip abroad on the S. S. *Kronprinzessin Cecilie* sailing July 28th, 1914?

Answer: To close a business contract.

Second Interrogatory:

When did you decide to go abroad and when, where and from whom, did you purchase your

312 ticket?

Answer: I decided to go abroad at 1:15 p. m. July 27th. I purchased my ticket on board the steamship between 11:00 and 12:00 p. m. on July 27th from George S. Stirl, a ticket agent who bought it from an agent, Oelrichs & Co., in the purser's office.

Third Interrogatory:

Did not your ticket state Cherbourg and not Plymouth to be your destination?

Claimant's Interrogatories and Rantoul's Answers.

313

Answer: I bought and paid for passage for Plymouth, and although I never made any close examination of the ticket, my recollection is that the ticket provided for passage to Plymouth.

Fourth Interrogatory:

How much cash did you have with you on said steamship, and what means were at your disposal for obtaining cash upon your arrival in Europe?

314

Answer: I had probably not more than $50 in cash with me on the steamship. I also had a letter of credit on Baring Brothers, Limited, for five hundred pounds.

Fifth Interrogatory:

What luggage did you take with you on said steamship?

315

Answer: One large suit case, one kit bag, one despatch box.

Sixth Interrogatory:

While on the voyage in question did you not decide to continue on said ship to Bremen or Bremerhaven, and did you not state such change of plans to a fellow passenger?

316

Answer: During the voyage I thought and stated to a fellow passenger that as I had learned that Monday, August 2nd was a Bank Holiday in England, I might proceed on the steamer to Bremerhaven, if I could save time by doing that. The determination rested on the time of arrival of the steamer at Plymouth. I was anxious to get to Norway so soon as possible.

It was generally assumed on board that we would land in Plymouth Sunday afternoon, August 2nd, and arrive in London in time for a late dinner.

317 *Claimant's Interrogatories and Rantoul's Answers.*

Seventh Interrogatory:

What was your ultimate destination in Europe and what was the date of your proposed return to the United States?

Answer: Christiania, Norway, and Stockholm, Sweden. I planned to return on the steamer sailing from England August 11th, 12th or 15th.

318

Eighth Interrogatory:

In your libel you claim $5,000 damages. Please set forth in detail the computation by which you arrive at this sum, showing fully the manner in which you claim the alleged damages arose?

Answer: Commission deducted by North German Lloyd in returning me the purchase price of the ticket $6.25

319 Value of lost time estimated..... 5000.00

Inconvenience and worry resulting from failure of steamship and owners to carry out their contract 1800.00

Total $6806.25

Ninth Interrogatory:

Do you claim to have delivered either to the ship-owner or its agent, in writing, any notice of

320 the claim set forth in your libel? If so state the date on which such notice was given and whether it was delivered to the ship-owner or its agent, and annex a copy thereof to this interrogatory as a part of your answer.

Answer: The only written claim made to the owner of the steamship on my behlaf was by my

Claimant's Interrogatories and Rantoul's Answers.

321

attorneys, Convers & Kirlin, in whose hands I have placed my interests.

C. W. RANTOUL, JR.

Sworn to before me this 2nd day of March, 1915.

CLETUS KEATING,
Notary Public,
New York County.

322

CONVERS & KIRLIN,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libelant.

Filed March 3, 1915.

323

324

325 *Libel of Hanssens.*

To the Honorable James M. Morton, Jun., United States District Judge for the District of Massachusetts:

The libel of Maurice Hanssens against the steamship *Kronprinzessin Cecilie,* her engines, boilers, tackle, apparel and furniture, in a cause of contract, civil and maritime, alleges on in-
326 formation and belief as follows:

First: At all the times hereinafter mentioned, the libelant, Maurice Hanssens, was and still is a subject of the Kingdom of Belgium.

Second: The steamship *Kronprinzessin Cecilie,* is a German vessel owned by the North German Lloyd, a corporation existing under the laws of the Empire of Germany. The steamship is now
327 lying in the port of Boston, within this District. At the times hereunder mentioned the *Kronprinzessin Cecilie* was operating as a common carrier of passengers and cargo between the ports of New York City, in New York, Plymouth, in England, Cherbourg, in France, and Bremen, in Germany.

Third: On July 27, 1914, the libelant went on board the steamship *Kronprinzessin Cecilie* then lying in the port of New York, having purchased
328 from the steamship and paid for a passage from the port of New York to London via the port of Plymouth, England.

Fourth: In consideration of the passage money paid by the libelant, the owners of the steamship, by their authorized agents, undertook to transport the libelant on the steamship *Kronprinzessin Cecilie* from the port of New York to the port of

329

Plymouth, England, on a voyage to start about 1 A. M., on July 28, 1914.

Fifth: Thereafter, and about 1 A. M., on July 28th, 1914, the steamship *Kronprinzessin Cecilie* proceeded on her voyage from New York to Plymouth, England. The distance covered by the steamship, the conditions of weather from day to day, and the latitude and longitude, as ascertained at noon of each day, were announced to the passengers by the officers of the steamship as follows:

330

ABSTRACT OF LOG.

July 1914	Miles	Lat. N.	Long. W.	Remarks
28	196	40°10′	69°35′	Overcast; rainy; light sea.
29	535	40°10′	57°55′	Cloudy; moderate sea.
30	534	40°15′	46°22′	Cloudy; hazy; moderate sea.
31	549	45°25′	35°36′	Cloudy; moderate sea.

331

Distance till noon 1814 miles.

About 10:15 P. M., on Friday, July 31, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth. She then turned back on her course, abandoning the voyage to Plymouth and proceeded toward the United States.

332

Sixth: About 10:30 P. M., on the evening of July 31, Charles Polack, the master of the steamship, entered the smoking room of the steamship and announced to the passengers who were there assembled that he had just received a wireless message from his owners informing him that war had been declared between Germany, Russia, France and England, and instructing him to re-

turn at once to America. He also said that the steamer had already turned around and was proceeding back to America.

Seventh: The action of the master in turning the vessel on her course and proceeding back to America was taken pursuant to the instructions received by him from his owners, as hereinabove set forth.

Eighth: Thereafter the steamship *Kronprinzessin Cecilie* continued on her way toward the United States and arrived and anchored at Bar Harbor, Maine, on the early morning of August 4, 1914, and was ordered by her owners to remain there indefinitely. She was convoyed by vessels of the United States to the port of Boston on November 6, 1914.

Ninth: In fact, war had not been declared and did not exist between Germany, Russia, England and France, on July 31, nor between any two of those countries or governments. The first declaration or state of war took place between Germany and Russia on August 1. War was declared between England and Germany on August 4 about 11 P. M., and between Germany and France on August 3 at 6:45 P. M. England, France and Russia are not and have not been at war with one another at any time in the year 1914.

Tenth: If the steamship *Kronprinzessin Cecilie* had not turned back on her course on July 31, and had proceeded on her voyage to Plymouth, she would have arrived at Plymouth, in ordinary course during the afternoon of Sunday, August

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2nd, and would have discharged her passengers for that port on the same day.

Eleventh: The instructions by the owners of the *Kronprinzessin Cecilie* to the master, on July 31, to proceed back to America at once, were wrongful and improper. The action of the master in turning the steamship on her course and proceeding back toward America constituted a wrongful deviation and abandonment of the voyage and a breach of the contract between the libelant and the owners of the steamship. 338

Twelfth: If the steamship *Kronprinzessin Cecilie* and her owners had carried out the terms of the contract with the libelant the latter would have arrived in ordinary course at his home in Brussels in Belgium on August 4, 1914. By reason of the breach of contract by the steamer and her owners, he was prevented from going to Brussels before it was seized and occupied by the German military forces, who now are in possession of the city. In consequence the libelant has been deprived of his property and has sustained other damage. 339

Thirteenth: By reason of the premises, the libelant has been damaged in the sum of Two hundred thousand dollars. Payment of this sum has been duly demanded of the owners of the *Kronprinzessin Cecilie* by the libelant but has been refused and no part thereof has been paid and the said sum still remains wholly due and unpaid and owing from the owners of the steamship to the libelant. 340

85

341 *Libel of Hanssens.*

Fourteenth: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law may issue against the steamship
342 *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, and that all persons having or claiming any interest therein, be cited to appear and answer in the premises and the interrogatories hereto annexed, and that a decree be entered herein, against the *Kronprinzessin Cecilie*, in favor of the libelant for the amount of his damages and costs, and that the said steamship be condemned and sold to pay the libelant's claim, or that the Court will grant to
343 the libelant such other or further relief as the justice of the cause may require.

MAURICE HANSSENS.

Sworn to before me this)
day of November, 1914.)

M. W. MACLAY, JR.,
Notary Public,
New York County.

344 CONVERS & KIRLIN,
BLODGETT, JONES, BURNHAM & BINGHAM
Proctors for Libelant.

Filed November 16, 1914.

Interrogatories of Hanssens to Claimant. 345

Interrogatories to be addressed to the owner and claimant of the steamship *Kronprinzessin Cecelie*, to be answered in writing and under oath.

First Interrogatory: If you say that the particulars set out in the fifth article of the libel are incorrect, state in what respect you claim they are incorrect and, also, state the distance covered 346
by the vessel as ascertained at noon of each day, the conditions of weather and the position of the vessel, so nearly as you can estimate it, at about 10:15 p. m., on Friday, July 31st, 1914, or immediately before the turning back by the vessel on her course.

Second Interrogatory: a. On what day and at what hour did the steamer turn back on her course from New York to Plymouth? b. What was her 347
course and what was her latitude and longitude at the time the change was made? c. What was her course after the change was made? d. What was the distance from Plymouth at the time the change was made?

Third Interrogatory: If you say that the particulars stated in the sixth article of the libel are incorrect, specify in what respects you claim them to be incorrect and state fully what you claim the 348
captain announced to the passengers in the smoking room of the steamship, on the evening of July 31st, 1914.

Fourth Interrogatory: a. If you say, in answer to the seventh article of the libel, that the action of the master, in turning the vessel on her

course and proceeding back to America, was not taken pursuant to instructions received by him from the owners of the vessel, state why he did have the vessel turn on her course and proceed back to America. b. On what information did the captain act in directing the change to be made? c. On what day and hour and in what manner was such information received by the
350 master and from whom did it come? d. If the information was in the form of a wireless message, state just what the language of the message was, and if it was transmitted in German or in code, give a translation and state what the code was.

Fifth Interrogatory: a. Did the master receive any wireless messages from the owners, or their agents, after the vessel had sailed from New York,
351 on July 28th, 1914, and until her arrival at Bar Harbor, on August 4th? If so, give the contents of each message and if the message was transmitted in German or in code, give a translation. b. Did the master send any wireless messages to the owners of the vessel, or their agents, after the vessel sailed on her voyage from New York, on July 28th, 1914? If so state the contents of all such messages, and if they were transmitted in German, or in Code, give a translation. c. Prior
352 to the departure of the vessel from New York on July 28th, 1914, had the master received any instructions from the owners, or their agents, in connection with the voyage that he was about to make and dealing in any way with possible interruption, deviation or abandonment of the voyage? If so, state fully what the instructions were and if they were in writing annex a copy and if they

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were in German, or in Code, give a translation and state what the Code was.

Sixth Interrogatory: a. Previously to or at the time of the departure of the vessel from New York on July 28th, 1914, had the master received an envelope or other paper from the owners or their agents with instructions to open the envelope or paper during the voyage on the happening of any contingency? b. Did the contingency happen? If so state what it was. c. Did the master open the envelope or paper? If so annex copy of the contents and if they were in German or in Code, give a translation and state what the Code was by which the contents was interpreted. 354

Seventh Interrogatory: Did the master exchange communications in any way with the owners, or their agents, after the arrival of the vessel at Bar Harbor, on August 4th, 1914? If so, annex copies of all such communications that he received or sent. State from whom they were received or to whom they were sent, and if they were in German or in Code, given a translation and state what the Code was. 355

Eighth Interrogatory: a. If in answer to the tenth article of the libel, you state that the vessel would not have arrived at Plymouth in ordinary course during the afternoon of Sunday, August 2nd, 1914, and would not have discharged her passengers for that port on the same day, state when in your opinion the vessel in ordinary course would have arrived at Plymouth and discharged her passengers for that port, if she had 356

357 not turned back on her course on July 31st. b. What is the basis of your estimate of your previous answer?

Ninth Interrogatory: a. Give the day and hour of the sailing of the vessel from the port of New York and of her arrival at Plymouth, for a period of one year prior to July 20th, 1914. b.
358 Give a short abstract of the vessel's log on those voyages as published in the Ocean Gazette, on board the steamship *Kronprinzessin Cecilie*, on the voyages in question, giving similar details to those set forth in the fifth article of the libel.

CONVERS & KIRLIN,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libelant.

Filed November 16, 1914.

359

360

UNITED STATES DISTRICT COURT. 361

DISTRICT OF MASSACHUSETTS.

MAURICE HANSSENS,
Libelant,

AGAINST

THE S. S. "KRONPRINZESSIN CECILIE," her engines, boilers, etc., 362
Respondent,

NORTH GERMAN LLOYD,
Owner and Claimant.

To the Honorable the Judges of the District Court of the United States, for the District of Massachusetts:

And now NORTH GERMAN LLOYD, a corporation 363
organized and existing under the laws of the Empire of Germany, and engaged in the transaction of business in the Southern District of New York, intervening as owner of the S. S. *Kronprinzessin Cecilie*, her engines, boilers, etc., appears before the Honorable Court and claims the said steamship, her engines, boilers, etc., as the same are attached by the Marshal, and avers that it is the true and *bona fide* owner of the said steamship, her engines, boilers, etc., and that no other person 364
is the owner thereof.

WHEREFORE it prays to defend accordingly.

NORTH GERMAN LLOYD, By
CHARLES VON HELMOLT,
Attorney in Fact.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

Subscribed and sworn to before me
this 21st day of November, 1914.

GEORGE RUGER,

365 *Amendment to Libel of Hanssens.*

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF MASSACHUSETTS.

MAURICE HANSSENS, Libelant, AGAINST STEAMSHIP "KRONPRINZESSIN CECILIE"	Amendment to Libel.

366

Pursuant to leave granted by the Court on February 23, 1915, the libelant amends his libel heretofore filed herein by changing paragraphs third,
367 fourth, seventh and twelfth so as to read as follows:

THIRD: On July 27, 1914, the libelant having purchased and paid for passage for his wife, Mrs. Hanssens and himself, on the steamship *Kronprinzessin Cecilie,* from the port of New York to London, via the port of Plymouth, England, went on board the steamship *Kronprinzessin Cecilie,* then lying in the port of New York.

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FOURTH: In consideration of the passage money paid by the libelant for his wife and himself the owners of the steamship, by their authorized agents, undertook to transport the libelant and wife on the steamship *Kronprinzessin Cecilie* from the port of New York to London, via the port of Plymouth, England, on a voyage to start at 1 A. M. on July 28, 1914.

SEVENTH: The master of the steamship subsequently stated to passengers on the steamship that he had received a sealed packet before sailing from New York, with instructions to open the packet in certain contingencies and that on receipt of a wireless message, sent from the office of the steamship in Bremen, he had opened the sealed packet and found that it contained information that war had broken out with England, France and Russia and that he should turn back at once to New York, and in pursuance of such instructions he had turned back immediately toward the United States. In fact the action of the master in turning the vessel back on her course and proceeding back to America was taken pursuant to orders received by him from his owners.

TWELFTH: By reason of the breach of contract by the steamer and her owners the libelant has sustained damages consisting of loss of his property, loss of passage money paid for passage of his wife and himself, loss of time, inconvenience and expense of maintenance in consequence of the failure by the steamship and her owners to transport the libelant and his wife in accordance with the terms of the contract.

MAURICE HANSSENS,

CONVERS & KIRLIN,
BLODGETT, JONES, BURNHAM & BINGHAM
Proctors for Libelant.

Sworn to before me this 2nd day of March, 1915.

WILLIAM H. McGRANN,
Notary Public,
Kings County.

[SEAL]

Filed March 3, 1915.

373 *Answer to Libel of Hanssens.*

To the Honorable the Judges of the United States District Court for the District of Massachusetts:

The answer of North German Lloyd, owner and claimant of the Steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, to the libel of Maurice Hanssens, in a
374 cause of contract, civil and maritime, alleges as follows:

I.

It admits the matters alleged in the *First*, *Second* and *Third* Articles of said amended libel.

Answering the *Fourth* Article of the amended libel, it admits that unless unforeseen circumstances should prevent said steamship was to set
375 sail on July 28, 1914, at 1 A. M., and it admits that in consideration of the passage money paid by the libelant for his wife and himself, claimant undertook to transport the libelant and his wife on the said steamship from the port of New York to the port of Plymouth, England, but in that behalf it denies that either directly or through its agents it agreed to transport the libelant and his wife to London or beyond Plymouth, and alleges that it agreed merely to furnish the
376 libelant with railway tickets for himself and his wife from Plymouth to London, and it also denies that either directly or through it agents it agreed to transport the libelant or his wife from the Port of New York to Plymouth absolutely or at all events, and alleges that the said agreement to transport was in accordance with the provisions of a certain passage ticket which was issued by claimant and accepted by libelant as the contract of

carriage covering the voyage in question, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of an European war. 377

It admits that the allegations contained in the *Fifth* Article of the amended libel are substantially true, except that it denies that the latitude of said steamship as ascertained at noon of July 30th, 1914, was announced to the passengers as 40° 15′ N, and in that behalf it alleges that at such time the latitude was in fact 40° 45′ N and on information and belief that it was so announced; except also that it denies that at about 10:15 P. M. on Friday, July 31st, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth or that at that time she turned back on her course or abandoned the voyage to Plymouth and proceeded to the United States and in that behalf it alleges that on said night said steamship turned back on her course at 10:09 P. M. and that her distance from Plymouth was then 1070 miles or more. 378 379

It admits that the action of the master in turning the vessel on her course and proceeding back to America was taken in concurrence with instructions received by him from his owners, and alleges that in taking such action, the master exercised a sound judgment and discretion with reference to the welfare of the passengers and crew and the best interests of the ship and cargo owners. As the remaining allegations contained in the *Sixth* Article of the amended libel consist merely of a statement of alleged conversations 380

381 between the master and certain unnamed passengers on the steamship and do not include any allegation of a material fact, claimant neither admits nor denies such allegations, but leaves the libelant to make such proof thereof as he may be advised.

It admits the matters alleged in the *Eighth* Ar-
382 ticle of the amended libel, except that it denies that said steamship was ordered by her owners to remain at Bar Harbor indefinitely.

It admits that war had not been declared between Germany, Russia, England and France nor between any two of the said countries or governments on July 31st, but it alleges that on said day Germany was, by Imperial proclamation, declared to be in a state of war, and that a state of war did exist between Germany and Russia, al-
383 though formal declaration thereof was not made until August 1st. It admits that war was not formally declared between England and Germany until August 4th, although before said date various unfriendly acts had been committed by each of said countries against the other. It denies that a state of war between Germany and France began on or about August 4th, and in that behalf it alleges that on account of the treaty relations
384 existing between France and Russia, a war with the former power became inevitable in the event of hostilities with the latter, and that in fact a state of war actually existed beween France and Germany at or about the same time as the commencement of a state of war between Germany and Russia.

Answering the *Tenth* Article of the amended libel, it denies on information and belief that the

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steamship *Kronprinzessin Cecilie*, if she had not turned back on her course on July 31st and had proceeded on her voyage to Plymouth, would have arrived at Plymouth in ordinary course on the afternoon of Sunday, August 2nd, or that she would have discharged her passengers for that port on that day, and in that behalf it denies any knowledge or information as to whether said 386
steamship would ever have arrived at said port.

It denies all and singular the matters alleged in the Eleventh and Twelfth Articles of the amended libel.

It denies all and singular the matters alleged in the *Thirteenth* Article of the amended libel, except that it admits its refusal to pay the libelant Two hundred thousand dollars.

Answering the *Fourteenth* Article of the 387
amended libel, it denies that the premises of said amended libel are true, and alleges that for the reasons hereinafter set forth this Honorable Court should decline to take jurisdiction thereof.

II.

Further answering the amended libel, claimant says that its S. S. *Kronprinzessin Cecilie* was built in the year 1907 at a cost of about $4,500,000; that at the time of the voyage hereinafter de- 388
scribed she was fully fitted, manned and equipped and had a full complement of officers and crew amounting in all to 650 men, all the officers and most of the crew being German subjects.

On July 28th, 1914, the *Kronprinzessin Cecilie* sailed from the port of New York having on board 1,048 passengers, of various nationalities most of them Germans, and gold bullion or bars and

389 gold coin of the declared value of $10,769,545.36, and bar silver of the declared value of $389,846.34, consigned to London and Paris via Plymouth and Cherbourg respectively. The gold and silver consigned to London were of the total declared value of $6,394,502.87, while the gold consigned to Paris was of the total declared value of $4,764,888.83.
390 In addition to this specie, the ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335.

The shipment of this large amount of specie on one of the most valuable vessels afloat was given great publicity and was the subject of repeated comment in the public press of this country and Europe, and the captain of the *Kronprinzessin Cecilie* had good reason to believe that the cruisers of Russia, France and Great Britain
391 would make every effort to capture so rich a prize.

While said steamship was proceeding on her voyage a general war broke out in Europe in which Germany was involved, of which the master was informed by a wireless message from her owners at Bremen, and owing to the danger of capture if she proceeded on her voyage on the evening of July 31, 1914, when the *Kronprinzessin Cecilie's* position was 46°46′ N and 30°21′ W
392 longitude from Greenwich, which was 1,070 miles or more from Plymouth, or more than two days' journey, she turned back on her course and returned to this country, and on August 4, 1914, put into Bar Harbor, Maine. Claimant thereupon paid the cost of the libelant's transportation from Bar Harbor to New York and repaid to the libelant the passage money which it had received from him.

The return of the *Kronprinzessin Cecilie* to a

port of the United States was not only a justifiable precaution, but was based upon reasonable ground for apprehension of capture and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew and to the cargo owners, and was a measure adopted by him in good faith in the exercise of his best judgment and discretion for the benefit of all concerned. A large part of her cargo was 394
destined for France and Germany, and even if the ship had succeeded in reaching Plymouth, England, and, after discharging her English bullion and passengers, in leaving that port without interference by the English authorities, she would have been in a most critical position with reference to the hostile fleets. A state of war existed between Germany and France and Russia before the date on which she could have arrived in due 395
course at Plymouth or Cherbourg, and even if she could have eluded the watchfulness of French cruisers, upon her arrival at Cherbourg, she would have been seized by the French authorities. In such circumstances it was impossible to reach Bremerhaven, her port of final destination, by passing through the English Channel and running the gauntlet of both French and British fleets. The Russian fleet, whose position was unknown to the captain of the *Kronprinzessin Cecilie,* was 396
an additional factor which was necessarily considered by him in making his decision. The only other course she could have pursued was to make directly for Bremerhaven without touching at any English or French port, in which event, if she had reached Bremerhaven without capture, although the ship herself would have been safe, the specie consigned to France and England would have been seized by the German government.

397 *Answer to Libel of Hanssens.*

Before the *Kronprinzessin Cecilie* commenced her return voyage the sailings of ships from German ports had been cancelled, traffic in the North Sea had been suspended, one or more English ports had been closed, the great powers had commenced a general mobilization of their land and sea forces, the channel service between England and France had been interrupted, a German mer-
398 chantman had been captured by Russian cruisers, British ships had been forcibly detained in German ports and some of them had been compelled to discharge their cargoes, by Imperial proclamation Germany had been declared in a state of war and German vessels in all parts of the world had been ordered to seek or remain in neutral ports.

The wireless message to the *Kronprinzessin Ce-*
399 *cilie*, referred to in the amended libel, was withheld by the North German Lloyd office until the last possible moment and until it was apparent that if she were permitted to proceed further she would not have sufficient coal to reach a port of refuge. As it was, when she arrived at Bar Harbor, there remained in her bunkers only 450 tons.

The action of the captain in directing the return of said steamship to the United States where the rights of all those interested in both ship and
400 cargo would be respected and protected was in concurrence with the instructions received from her owners as contained in the wireless message aforesaid and such instructions and the action following them were fully justified by the circumstances and were the exercise of a right given by the laws of the United States as well as by Article 634 of the Maritime Code of the German Empire which provides in substance that if a war

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be declared after the commencement of a voyage in consequence of which a vessel or the goods shipped thereon can no longer be considered free and would be liable to risk of capture, either party has the right to withdraw from the contract without being liable to damages, and by Articles 669 and 670 of said Maritime Code hereinafter more specifically referred to and by other provisions of the German Law.

402

The course pursued by the captain was entirely successful and his return to a port of refuge and the delivery of all the specie to the parties entitled thereto were accomplished without the capture or detention of a single passenger or member of the crew, and without loss of or damage to any of the specie or mixed cargo.

III.

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Claimant further alleges that by the passage ticket, constituting the contract of carriage it was expressly provided that said steamship should have liberty to put back or into any port at the discretion of the commander and to deviate from the direct and customary course, and that the action of the master of the steamship *Kronprinzessin Cecilie* in turning said ship and putting back into the port of Bar Harbor, Maine, was an exercise of the right thereby conferred.

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IV.

Claimant further alleges that upon the arrival of said steamship in the United States, libelant abandoned said contract and elected to treat it as cancelled by demanding and accepting a ticket for the transportation of himself and his wife on a White Star steamer, which ticket was paid for by the claimant without additional cost to the libelant.

405 *Answer to Libel of Hanssens.*

V.

Claimant further alleges that under the contract of carriage, it was understood by and between the libelant and the claimant that time should not be of the essence of the contract.

VI.

406 Claimant further alleges that the said contract of carriage expressely provided that no claim thereunder should be enforceable against the ship owner or his property or the agent or passage broker unless notice thereof in writing with full particulars of the claim should be delivered to the ship owner or agent within five days after the passengers should be landed from the translantic ocean steamer at the termination of her
407 voyage or in case of the voyage being abandoned or broken up within ten days thereafter. That no such notice was given within either of the periods so specified.

VII.

Claimant further alleges that in the passage ticket constituting the contract of carriage covering the voyage in question, it was expressly pro-
408 vided that all questions arising thereunder should be decided according to German Law; that Article 669 of the Maritime Code of the German Empire, which is embodied in the German Commercial Code and constitutes part of the German Law, provides as follows:

> "The passenger may withdraw from the passage contract, when in consequence of a war breaking out, the vessel cannot any longer

be considered as free, and would be exposed to the risk of capture, or if the ship's voyage should be delayed be Government order.

The ship owner has likewise the right of withdrawal when, in either of the above cases he gives up the voyage or when the vessel is intended principally for the transport of goods, and the adventure cannot be undertaken, because, without any fault on his part, 410 such goods cannot be forwarded."

That Article 670, of said code provides, among other things, that in all cases in which, pursuant to said Article 669, the passage contract is dissolved, neither party is liable to damages.

Claimant further alleges that its withdrawal from the passage contract and the action of the captain in turning the ship before the completion 411 of her voyage and putting back into the port of Bar Harbor, Maine, as hereinbefore set forth, were the exercise of a right expressly conferred upon the shipowner by the articles above referred to and were entirely in accord with other provisions of the law of the German Empire.

VIII.

Claimant further alleges, upon information and 412 belief, that the libelant is and at all the times mentioned in the said libel was a subject of the King of the Belgians, and that at the time of the commencement of this suit and for some time prior thereto a state of war existed and still exists between the Empire of Germany and the Kingdom of Belgium; that upon the outbreak of said war the subjects of each of said belligerent powers were forbidden by law to trade or hold intercourse

with or pay claims or obligations due or to become due the subjects of the other, and that all rights and remedies to enforce such claims and obligations were suspended until the termination of said war; that the greater part of the libelant's alleged damages, if any were in fact sustained by him, resulted from the seizure and occupation of the City of Brussels by the German mil-
414 itary forces, and that the trial of this case and the adjudication by the court of the libelant's alleged claim for damages would involve an examination into the military operations conducted in Belgium by the German military authorities; that an award of damages to the libelant would involve an adjudication by a court of a neutral country that the property of a German corporation is liable for acts committed by the military
415 forces of its Government; that both libelant and claimant being aliens the court may, and under the peculiar circumstances of this case should decline to take jurisdiction.

WHEREFORE claimant prays that the libel may be dismissed with costs and that it may have such other or further relief as in justice it may be entitled to receive.

CHOATE, LAROCQUE & MITCHELL,
416 Proctors for Claimant.

Verification by Gustav Schwab of the firm of Oelrichs & Co., general agents of claimant, March 27, 1915.

Filed March 29, 1915.

Interrogatories of Claimant to Hanssens.

417

Interrogatories propounded to libelant to be by him answered under oath.

First Interrogatory:

Give fully and in detail a precise statement of all the items of property which, in the Twelfth Article of your amended libel, you claim to have lost in consequence of the failure of the S. S. *Kronprinzessin Cecilie* and her owners to transport you and your wife in accordance with the terms of the contract, fully describing each item of such property and giving its value, location at the time of its alleged loss and the method by which you fix its value, and also the precise manner in which its loss was incurred.

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Second Interrogatory:

Is it not a fact that after the return of the S. S. *Kronprinzessin Cecilie* to Bar Harbor, Maine, you and your wife were furnished, free of expense, transportation from Bar Harbor to New York?

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Third Interrogatory:

Is it not a fact that after your return to New York the claimant or its agents furnished you and your wife, free of additional expense, transportation by another steamer to England?

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Fourth Interrogatory:

In view of your answer to the last preceding interrogatory, is it not a fact that the statement contained in the Twelfth Article of your amended libel, that you lost the passage money paid for the passage of your wife and yourself, is misleading and not in accordance with the facts?

421 *Interrogatories of Claimant to Hanssens.*

Fifth Interrogatory:

State fully the precise method by which you estimate your loss of time as an item of damage, setting forth the precise method of your computation and the amount claimed by you for this item of alleged damage.

Sixth Interrogatory:

422 State fully the precise method by which you estimate the damage sustained by you by reason of "inconvenience", giving in detail your computation and the amount claimed by you for this item of alleged damage.

Seventh Interrogatory:

State fully and in detail all items of expense of maintenance claimed by you as elements of your 423 alleged damage, how, when and where each one of such items of expense was incurred and the aggregate amount claimed by you for all such items.

Eighth Interrogatory:

State fully how the failure of the Steamship *Kronprinzessin Cecilie* to carry you to Plymouth, England, resulted in

(a) The loss of your property.

424 (b) The loss of passage money paid for passage of your wife and yourself.

(c) Loss of time.

(d) Inconvenience, and

(e) Expense of maintenance.

Ninth Interrogatory:

What was the object of your trip abroad on the S. S. *Kronprinzessin Cecilie* sailing July 28, 1914?

Interrogatories of Claimant to Hanssens.

Tenth Interrogatory:

How much cash did you have with you on said steamship, and what means were at your disposal for obtaining additional cash after your arrival at the port of destination?

Eleventh Interrogatory:

What luggage did you take with you on said steamship?

Twelfth Interrogatory:

What was your ultimate destination in Europe, and what was the date of your proposed return to the United States?

Thirteenth Interrogatory:

At the time of sailing on the *Kronprinzessin Cecilie* were you connected in any way with the Belgian Army or with any Belgian Military Organization? If so, in what capacity? Was your return to Belgium prompted by any orders received from the Belgian Government or Military Authorities? If so, state such orders fully and at length. If your return to Belgium was purely voluntary, state whether you intended to enlist in the Belgian Army or offer your services in case of the outbreak of war.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

Filed March 29, 1915.

429 *Libel of National City Bank.*

To the Honorable James M. Morton, Jr., United States District Judge for the District of Massachusetts:

The libel and complaint of The National City Bank of New York against the Steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, in a cause of contract, civil
430 and maritime, alleges on information and belief, as follows:

FIRST FOR A FIRST CAUSE OF ACTION.

FIRST: The libelant is now, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the United States.

SECOND: The steamship *Kronprinzessin Cecilie*,
431 is a German vessel owned by the North German Lloyd, a corporation existing under the laws of the Empire of Germany. The steamship is now lying in the port of Boston, within this district. At the times hereinafter mentioned the *Kronprinzessin Cecilie* was operating as a common carrier of passengers and cargo between the ports of New York City, in New York, Plymouth, in England, Cherbourg, in France, and Bremen, in Germany.

432 THIRD: On or about July 27, 1914, the libelant delivered to and shipped on board the steamship *Kronprinzessin Cecilie*, then lying in the port of New York, bound for Bremerhaven, Germany, via Plymouth, England, in good order and condition, twenty-one (21) kegs of gold bullion, marked N. C. B. London, 50-70, of the agreed and declared value of One million, sixty-one thousand, seven hundred eighteen 89/100 Dollars ($1,061,718.89),

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to be carried and transported by the said steamship *Kronprinzessin Cecilie*, as a common carrier, to Plymouth, England, thence to be forwarded to London, at steamer's expense, and there to be delivered, in like good order and condition as when shipped, unto the London City and Midland Bank, Ltd., for the account of the shipper, this libelant, in consideration of freight in the sum of One thousand, nine hundred ninety 72/100 Dollars ($1,990.72), which was prepaid at the time of the said shipment. The owner of the steamship thereupon duly delivered to this libelant a certain bill of lading binding said steamship to transport and deliver the gold as aforesaid.

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FOURTH: Thereafter, and about 1 A. M., on July 28, 1914, the steamship *Kronprinzessin Cecilie* proceeded on her voyage from New York to Plymouth, England. The distance covered by the steamship, the conditions of weather from day to day, and the latitude and longitude, as ascertained at noon of each day, were announced to the passengers by the officers of the steamship as follows:

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ABSTRACT OF LOG.

July 1914	Miles	Lat. N.	Long. W.	Remarks.
28	196	40°10′	69°35′	Overcast; rainy, light sea.
29	535	40°10′	57°55′	Cloudy; moderate sea.
30	534	40°15′	46°22′	Cloudy; hazy, moderate sea.
31	549	45°25′	35°36′	Cloudy; moderate sea.
		Distance till noon 1,814 miles.		

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About 10:15 P. M., on Friday, July 31, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth. She then turned back on

437 *Libel of National City Bank.*

her course, abandoning the voyage to Plymouth and proceeded toward the United States.

FIFTH: About 10:30 P. M., on the evening of July 31, 1914, Charles Polack, the master of the steamship, entered the smoking room of the steamship and announced to the passengers who were there assembled that he had just received a wire-
438 less message from his owners informing him that war had been declared between Germany, Russia, France and England, and instructing him to return at once to America. He also said that the steamer had already turned around and was proceeding back to America.

SIXTH: The action of the master in turning the vessel on her course and proceeding back to
439 America was taken pursuant to the instructions received by him from his owners, as hereinabove set forth.

SEVENTH: Thereafter the steamship *Kronprinzessin Cecilie* continued on her way toward the United States and arrived and anchored at Bar Harbor, Maine, on the early morning of August 4, 1914, and was ordered by her owners to remain there indefinitely.

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EIGHTH: In fact, war had not been declared and did not exist between Germany, Russia, England and France, on July 31, 1914, nor between any two of those countries or governments. The first declaration or state of war took place between Germany and Russia on August 1, 1914. War was declared between England and Germany on August 4, 1914 about 11 P. M., and between Germany and France about 6:45 P. M. on August

3, 1914. England, France and Russia are not and have not been at war with one another at any time in the year 1914.

NINTH: If the steamship *Kronprinzessin Cecilie* had not turned back on her course on July 31, 1914, but had proceeded on her voyage to Plymouth, she would have arrived at Plymouth in ordinary course during the afternoon of Sunday, 442
August 2, 1914, and would have discharged her cargo for that port on the same day, and the said shipment would have been received by the London City and Midland Bank, Ltd., so as to be available for account of this libelant in London in the ordinary course on August 4, 1914.

TENTH: The instructions by the owners of the *Kronprinzessin Cecilie* to the master, on July 31, 443
1914, to proceed back to America at once, were wrongful and improper. The action of the master in turning the steamship on her course and proceeding back toward America constituted a wrongful deviation and abandonment of the voyage and a breach of the contract between the libelant and the owners of the steamship.

ELEVENTH: The said steamship, in violation of its duty, has failed and refused to carry and transport the said kegs of gold to Plymouth, England, 444
and there deliver and forward the same in accordance with the terms of the aforesaid contract with libelant.

TWELFTH: In view of the wrongful abandonment of the voyage and of the deviation of the steamer to Bar Harbor, Maine, and of the indefinite postponement of her further movements,

445 the libelant, on or about August 10, 1914, accepted redelivery of said twenty-one (21) kegs of gold from the steamship *Kronprinzessin Cecilie*, upon an agreement with the owner of said vessel, through their duly-constituted general agents at New York, that such re-delivery of the gold should not constitute a waiver of or in any way prejudice the libelant's claim against said steamship arising 446 from the failure to deliver the gold in England in accordance with the terms of the bill of lading.

THIRTEENTH: By reason of the failure of the steamship *Kronprinzessin Cecilie* to deliver the said gold at Plymouth, England, as agreed in accordance with the bill of lading the libelant has suffered damages exceeding the sum of Four hundred and four thousand, one hundred fifty 447 06/100 Dollars ($404,150.06), no part of which has been paid, although duly demanded of the steamship, and her owner.

FOURTEENTH: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

SECOND, FOR A SECOND CAUSE OF ACTION.

448 FIRST: The libelant repeats and realleges each and every allegation contained in Articles First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Fourteenth of the foregoing First Cause of Action.

SECOND: On or about July 27, 1914, the libelant delivered to and shipped on board the steamship *Kronprinzessin Cecilie*, then lying in the port of New York, bound for Bremerhaven, Germany, via

Plymouth, England and Cherbourg, France, in good order and condition, forty (40) kegs of Gold Bullion, marked N. C. B., Paris, 1-40, of the agreed and declared value of Two million one hundred four thousand, two hundred fifty-four 34/100 Dollars ($2,104,254.34), to be carried and transported by the said steamship *Kronprinzessin Cecilie*, as a common carrier, to Cherbourg, France, thence to be forwarded to Paris, France, and there to be delivered, in like good order and condition as when shipped, unto the Credit Lyonnais, for the account of the shipper, this libelant, in consideration of freight in the sum of Two thousand, six hundred thirty 32/100 Dollars ($2,630.32), which was prepaid at the time of the said shipment. The owner of the steamship thereupon duly delivered to the libelant a certain bill of lading binding said steamship to transport and deliver the gold as aforesaid.

THIRD: The said steamship, in violation of its duty, has failed and refused to carry and transport the said kegs of gold to Cherbourg, France, and there to deliver and forward the same in accordance with the terms of the aforesaid contract with libelant. If the said steamship had not turned back on her course on July 31, 1914, but had proceeded on her voyage to Cherbourg, she would have arrived at Cherbourg in ordinary course about midnight of Sunday, August 2, 1914, and would have discharged her cargo for that port soon thereafter, and long before the declaration of war between Germany and France hereinbefore referred to; and the said shipment would have been received by the Credit Lyonnais, so as to be available for account of this libelant

in Paris in the ordinary course, on August 4, 1914.

FOURTH: In view of the wrongful abandonment of the voyage and of the deviation of the steamer to Bar Harbor, Maine, and of the indefinite postponement of her further movements, the libelant, on or about August 10, 1914, accepted re-delivery of said forty (40) kegs of gold from the steamship *Kronprinzessin Cecilie,* upon an agreement with the owner of said vessel, through their duly-constituted general agents at New York that such re-delivery of the gold should not constitute a waiver of or in any way prejudice from the libelant's claim against said steamship arising from the failure to deliver the gold in France in accordance with the terms of the bill of lading.

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FIFTH: By reason of the failure of the steamship *Kronprinzessin Cecilie* to deliver the said gold at Cherbourg in France, as agreed, the libelant has suffered damages exceeding the sum of Thirty-two thousand and seven 43/100 Dollars ($3,2007.43), no part of which has been paid, although duly demanded of the steamship, and her owner.

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WHEREFORE, the libelant, The National City Bank of New York, claiming a lien upon said steamship *Kronprinzessin Cecilie* by reason of the premises for the sum of Four hundred thirty-six thousand, one hundred fifty-seven 49/100 Dollars (436,157.49), now due to it and unpaid as set forth prays.

1. That process *in rem* in due form of law according to the course and practice of this Court

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in proceedings in admiralty issue forthwith against the said steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture and that the said steamship be arrested and seized thereunder.

2. That all persons having any interest in the said steamship, her engines, boilers, tackle, apparel and furniture, may be cited and summoned 458
to appear and answer in the premises.

3. That the Court will decree in favor of the libelant, The National City Bank of New York, against the steamship *Kronprinzessin Cecilie* for the damages as claimed in this libel, in the sum of Four hundred thirty-six thousand, one hundred fifty-seven 49/100 Dollars ($436,157.49), with interest from August 4, 1914, together with the costs and disbursements of this action. 459

4. That the said steamship *Kronprinzessin Cecilie* may be ordered by the Court to be condemned and sold and the proceeds of said sale applied to the said claim of the libelant.

5. That the owner or claimant of the steamship *Kronprinzessin Cecilie* be required to answer in writing and under oath the interrogatories annexed to this libel, and to produce all documents demanded by said interrogatories. 460

6. That the Court will grant to the libelant such other and further relief as shall be just in the premises.

SHEARMAN & STERLING,
Proctors for Libelant.

Verification by John E. Gardin, vice-president, November 11, 1914.

Filed November 16, 1914.

461 *Answer to Libel of National City Bank.*

To the Honorable James M. Morton, Jr., United States District Judge for the District of Massachusetts.

The answer of North German Lloyd, owner and claimant of the Steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, to the libel and complaint of The National City
462 Bank of New York in a cause of contract civil and maritime, alleges as follows:

I.

Answering the first alleged cause of action set forth in the libel, claimant admits the matters alleged in the First and Second articles thereof.

It admits that on or about the 27th day of July, 1914, the libelant delivered to and shipped on board the Steamship *Kronprinzessin Cecilie*, then
463 lying in the port of New York bound for Bremerhaven, Germany, via Plymouth, England, in apparent good order and condition, twenty-one (21) kegs said to contain U. S. gold bars marked "N. C. B. London, 50-70" and that the value thereof was declared by the shipper to be One million sixty-one thousand, seven hundred eighteen 89/100 Dollars ($1,061,718.89) to be carried and transported by said steamship, as a common carrier,
464 to Plymouth, England, and thence to be forwarded at steamer's expense but at owner's risk to London and there delivered to London City and Midland Bank, Ltd., or to its or their assigns. It denies that it has any knowledge except by said libel, as to whether said twenty-one (21) kegs of gold bars were shipped in actual good order or condition and it denies that any agreement was made between the parties as to the actual value thereof, but admits and alleges that it was agreed

by and between the parties that in no case should the steamer or carrier be responsible for a greater value than that so declared. It alleges that the carriage of the said kegs of gold bars was undertaken by the claimant subject to and in accordance with the conditions and exceptions contained in a certain bill of lading, a copy of which is hereto annexed marked Exhibit "A", which was issued 466
by the claimant and accepted by the libelant as the contract of carriage covering the shipment in question, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of a European war. It admits the prepayment of freight in the sum of One thousand, nine hundred ninety 72/100 Dollars ($1,990.72) and admits and alleges that it thereupon delivered to the libelant 467
the said bill of lading, but denies that said bill of lading bound said steamship to transport and deliver the gold at all events or as alleged in the said libel.

It admits that the allegations contained in the Fourth article of the libel are substantially true, except that it denies that the latitude of said steamship as ascertained at noon on July 30, 1914, was announced to the passengers as 40° 15′ N. and 468
in that behalf it alleges that at such time the latitude was in fact 40° 45′ N., and on information and belief that it was so announced; except also that it denies that at about 10:15 P. M. on Friday, July 31, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth or that at that time she turned back on her course or abandoned the voyage to Plymouth and proceeded to the United States, and in that behalf

it alleges that on said night said steamship turned back on her course at 10:09 P. M. and that her distance from Plymouth was then 1070 miles or more.

As the allegations contained in the Fifth article of the libel consist merely of a statement of an alleged conversation in the smoking room of said steamship and do not include any allegation of a material fact, claimant neither admits nor denies said allegations but leaves the libelant to make such proof thereof as it may be advised.

It admits that the action of the master in turning the vessel on her course and proceeding back to America was taken in concurrence with instructions received from his owners and alleges that in taking such action the master exercised a sound judgment and discretion with reference to the welfare of the passengers and crew and the best interests of the ship and cargo owners.

It admits the matters alleged in the Seventh article of the libel except that it denies that said steamship was ordered by her owners to remain at Bar Harbor indefinitely.

It admits that war had not been formally declared between Germany, Russia, England and France, nor between any two of the said countries or governments, on July 31st, but it alleges that on said day Germany was, by Imperial Proclamation declared to be in a state of war and that a state of war did exist between Germany and Russia, although formal declaration thereof was not made until August 1st. It admits that war was not formally declared between England and Germany until August 4th at 7 P. M. to take effect on the same date at 11 P. M., although before said date various unfriendly acts had been

committed by each of said countries against the other. It denies that there was ever a formal declaration of war between Germany and France, excepting that in the evening of August 3rd, the German Ambassador at Paris, when demanding his passports, handed to the French Minister of Foreign Affairs a note declaring that the German Empire considered itself in a state of war with 474
France, but it alleges that on account of the treaty relations existing between France and Russia, a war between Germany and the former power became inevitable in the event of hostilities with the latter and that in fact a state of war actually existed between France and Germany at or about the same time as the commencement of a state of war between Germany and Russia.

It denies on information and belief that the steamship *Kronprinzessin Cecilie,* if she had not 475
turned back on her course on July 31st and had proceeded on her voyage to Plymouth, would have arrived at Plymouth in ordinary course on the afternoon of Sunday, August 2, 1914, or that she would have discharged her cargo for said port on that day and in that behalf it denies any knowledge or information as to whether said steamship would ever have arrived at said port or as to when, if she had arrived, the shipment in question 476
would have been received from the railroad company by the London City and Midland Bank, Ltd., or been available for the account of libelant in London.

It denies all and singular the matters alleged in the Tenth and Eleventh articles of the libel.

It admits that on or about August 10, 1914, the libelant accepted redelivery of said twenty-one (21) kegs of gold from the said steamship and

477 *Answer to Libel of National City Bank.*

alleges that such redelivery was at the libelant's special instance and request, contained in a letter dated August 10, 1914, but that the contents of such letter, referred to as an "agreement" in the Fifth clause of the libel is therein so inaccurately and incompletely set forth that a copy thereof is hereto annexed marked Exhibit "B".

478 It denies that by reason of the alleged failure of the steamship *Kronprinzessin Cecilie* to deliver said gold at Plymouth, England, as agreed, the libelant has suffered damages exceeding the sum of Four hundred and four thousand one hundred and fifty and 06/100 Dollars ($404,150.06) or in any other amount. It admits that no part of said sum has been paid and that demand therefor has been made. It admits the admiralty and maritime jurisdiction of the United States and of this

479 Honorable Court.

Further answering the first alleged cause of action set forth in said libel, claimant denies each and every allegation therein contained not hereinbefore specifically admitted or denied.

II.

Answering the second alleged cause of action set forth in the libel, claimant repeats its admis-

480 sions and denials and re-alleges each and every allegation hereinbefore made by it with respect to the matters alleged in articles First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Fourteenth of the first alleged cause of action.

It admits that on or about July 27, 1914, the libelant delivered to and shipped on board the Steamship *Kronprinzessin Cecilie* then lying in the port of New York bound for Bremerhaven,

Germany via Plymouth, England and Cherbourg, France, in apparent good order and condition, forty (40) kegs, said to contain U. S. Gold bars marked N. C. B. Paris 1-40, and that the value thereof was declared by the shipper to be Two Million one hundred and four thousand, two hundred and fifty-four and 34/100 ($2,104,254.34) dollars, to be carried and transported by said steamship *Kronprinzessin Cecilie*, as a common carrier, to Cherbourg, France, and thence to be forwarded at steamer's expense but at owner's risk to Paris, France, and there delivered in like order and condition unto the Credit Lyonnais or to its or their assigns. It denies that it has any knowledge, except by said libel, as to whether said forty (40) kegs of gold bars were shipped in actual good order or condition, and it denies that any agreement was made between the parties as to the actual value thereof, but admits and alleges that it was agreed by and between the parties that in no event should the steamer or carrier be responsible for a greater value than that so declared. It alleges that the carriage of the said kegs of gold bars was undertaken by the claimant subject to and in accordance with the conditions and exceptions contained in a certain bill of lading, a copy of which is hereto annexed marked Exhibit "C", which was issued by the claimant and accepted by the libelant as the contract of carriage covering the shipment in question, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of an European war. It admits the prepayment of freight in the sum of Two Thousand six hun-

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485 *Answer to Libel of National City Bank.*

dred and thirty and 32/100 ($2,630.32) dollars, and admits and alleges that it thereupon delivered to the libelant the said bill of lading, but denies that said bill of lading bound said steamship to transport and deliver the gold at all events or as alleged in the said libel.

It denies all and singular the matters alleged
486 in the Third article.

It admits that on or about August 10, 1914, the libelant accepted redelivery of said forty (40) kegs of gold from the said steamship, and alleges that such redelivery was at the libelant's special instance and request, contained in the letter hereinbefore referred to and hereto annexed, marked Exhibit "B."

It denies that by reason of the alleged failure of the steamship *Kronprinzessin Cecilie* to deliver
487 said gold at Cherbourg, France, as agreed, the libelant has suffered damages exceeding the sum of Thirty two thousand and seven and 43/100 ($32,007.43) dollars, or in any amount whatsoever. It admits that no part of said sum has been paid and that demand therefor has been made.

Further answering the second alleged cause of action set forth in said libel, claimant denies each
488 and every allegation therein contained not hereinbefore specifically admitted or denied.

III.

Further answering the first and second alleged causes of action set forth in the libel claimant says that its said S. S. *Kronprinzessin Cecilie* was built in the year 1907 at a cost of about $4,500,000; that at the time of the voyage hereinafter de-

scribed she was fully fitted, manned and equipped and had a full complement of officers and crew amounting in all to 650 men, all the officers and most of the crew being German subjects. 489

On July 28th, 1914, the *Kronprinzessin Cecilie* sailed from the port of New York having on board 1,048 passengers of various nationalities most of them Germans, and gold bullion or bars and gold coin of the declared value of $10,769,545.36, and bar silver of the declared value of $389,846.34, consigned to London and Paris via Plymouth and Cherbourg respectively. The gold and silver consigned to London, of which libelant's shipment mentioned in the first alleged cause of action constituted a part, were of the total declared value of $6,394,502.87, while the gold consigned to Paris, of which libelant's shipment mentioned in the second alleged cause of action constituted a part, was of the total declared value of $4,764,888.83. In addition to this specie, the ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335. 490 491

The shipment of this large amount of specie on one of the most valuable vessels afloat was given great publicity and was the subject of repeated comment in the public press of this country and Europe, and the captain of the *Kronprinzessin Cecilie* had good reason to believe that the cruisers of Russia, France and Great Britain would make every effort to capture so rich a prize. 492

While said steamship was proceeding on her voyage a general war broke out in Europe in which Germany was involved, of which the master was informed by a wireless message from her owners at Bremen, and owing to the danger of capture if she proceeded on her voyage, on the

evening of July 31, 1914, when the *Kronprinzessin Cecilie's* position was 46° 46′ N and 30° 21′ W. longitude from Greenwich, which was 1,070 miles or more from Plymouth, or more than two days' journey, she turned back on her course and returned to this country, and on August 4, 1914, put into Bar Harbor, Maine, and on the 10th day
494 of August, 1914, at the special instance and request of the libelant she redelivered to it all the gold in question.

The return of the *Kronprinzessin Cecilie* to a port of the United States was not only a justifiable precaution but was based upon reasonable ground for apprehension of capture and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew and to the cargo owners, and was a measure adopted
495 by him in good faith in the exercise of his best judgment and discretion for the benefit of all concerned. A large part of her cargo was destined for France and Germany, and even if the ship had succeeded in reaching Plymouth, England, and, after discharging her English bullion and passengers, in leaving that port without interference by the English authorities she would have been in a most critical position with reference to the hostile fleets. A state of war existed between
496 Germany and France and Russia before the day on which she could have arrived in due course at Plymouth or Cherbourg, and even if she could have eluded the watchfulness of French cruisers, upon her arrival at Cherbourg, she would have been seized by the French authorities. In such circumstances it was impossible to reach Bremerhaven her port of final destination, by passing through the English Channel and running the

gauntlet of both French and British fleets. The Russian fleet, whose position was unknown to the captain of the *Kronprinzessin Cecilie,* was an additional factor which was necessarily considered by him in making his decision. 497

The only other course she could have pursued was to make directly for Bremerhaven without touching at any English or French port, in which event, if she had reached Bremerhaven without capture, although the ship herself would have been safe, the specie consigned to France and England would have been seized by the German government. 498

Aside from the danger of capture, the S. S. *Kronprinzessin Cecilie,* by delivering the gold in France to the Credit Lyonnais, a French bank, would have been giving aid to citizens of a country with which Germany was at war, and by reason thereof the further performance of the contract of carriage referred to in the second alleged cause of action became illegal immediately upon the outbreak of war between Germany and France. 499

Before the *Kronprinzessin Cecilie* commenced her return voyage the sailings of ships from German ports had been cancelled, traffic in the North Sea had been suspended, one or more English ports had been closed, the great powers had commenced a general mobilization of their land and sea forces, the channel service between England and France had been interrupted, a German merchantman had been captured by Russian cruisers, British ships had been forcibly detained in German ports and some of them had been compelled to discharge their cargoes, by Imperial proclamation Germany had been declared in a 500

state of war and German vessels in all parts of the world had been ordered to seek or remain in neutral ports.

The wireless message to the *Kronprinzessin Cecilie*, referred to in the libel, was withheld by the North German Lloyd office until the last possible moment and until it was apparent that if she were permitted to proceed further she would not have
502 sufficient coal to reach a port of refuge. As it was, when she arrived at Bar Harbor, there remained in her bunkers only 450 tons.

The action of the captain in directing the return of said steamship to the United States where the rights of all those interested in both ship and cargo would be respected and protected was in concurrence with the instructions received from her owners as contained in the wireless message aforesaid and such instructions and the action
503 following them were fully justified by the circumstances and were the exercise of a right given by the laws of the United States as well as by Article 634 of the Maritime Code of the German Empire which provides in substance that if a war be declared after the commencement of a voyage in consequence of which a vessel or the goods shipped thereon can no longer be considered free and would be liable to risk of capture, either
504 party has the right to withdraw from the contract without being liable to damages, and by Articles 669 and 670 of said Maritime Code and by other provisions of the German Law.

The course pursued by the captain was entirely successful and his return to a port of refuge and the delivery of all the specie to the parties entitled thereto were accomplished without the capture or detention of a single passenger or member of the crew, and without loss of or damage to any of the specie or mixed cargo.

 505

IV.

Further answering the first and second alleged causes of action set forth in the libel, claimant alleges that it undertook the transportation of the twenty-one (21) kegs of gold referred to in the first alleged cause of action and the forty (40) kegs of gold referred to in the second alleged cause of action, in accordance with the provisions of 506
certain bills of lading, copies of which are hereto annexed marked Exhibits "A" and "C" respectfully, which were issued by the claimant and accepted by the libelant as the contracts of carriage covering the shipments in question. That the said bills of lading expressly provided that neither the steamer nor carrier should be liable for loss or damage occasioned by arrest and restraint of princes, rulers or people. Claimant further alleges that if the libelant has in fact 507
sustained any damage, the same was occasioned solely by the cause so expected.

V.

Further answering the first and second alleged causes of action set forth in the libel, claimant alleges that said bills of lading likewise expressly provided that neither the steamer nor carrier should in any case be responsible for a value 508
greater than that declared by the shippers in the margin. That the value of the shipment referred to in the first alleged cause of action was declared by the libelant in the margin of said bill of lading to be $1,061,718.89, and the value of the shipment referred to in the second alleged cause of action to be $2,104,254.34. That all the gold, representing said shipments and the value so declared, was redelivered by claimant to the libelant

509 *Answer to Libel of National City Bank.*

on August 10, 1914, and that immediately upon such redelivery all further responsibility on the part of this claimant or its ship *Kronprinzessin Cecilie*, ceased.

VI.

Further answering the first and second alleged
510 causes of action set forth in the libel, claimant alleges that at the time of said shipments it was understood and agreed by and between the parties that time should not be of the essence of the contract, and in that behalf it alleges that said bills of lading expressly provide that said steamer should have "liberty to call at Intermediate ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes,"
511 and that in accordance with the terms of said bills of lading it was understood and agreed that the steamer should have liberty to put into a port of refuge, and that neither the steamer nor carrier should be liable for "loss or damage caused by prolongation of the voyage."

WHEREFORE claimant prays that the libel may be dismissed, with costs, and that it may receive
512 such other or further relief as in justice it may be entitled to receive.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant,
40 Wall Street,
New York City.

Verification by C. von Helmolt of firm of Oelrichs & Co., general agents of claimant, December 10, 1914.

Filed December , 1914.

BREMEN.

OELRICHS & CO.,

GENERAL AGENTS.

ROADWAY, NEW YORK.

ANDO DAVIS & CO., 36 Southside St., Plymouth.

LLER, BRYANT & Co., Southampton, London.

NORTH GERMAN LLOYD,
12 Quai Alexandre III, Cherbourg.

ORTH GERMAN LLOYD, 2 Rue Scribe, Paris.

AGENTUR DES NORDDEUTSCHEN LLOYD,
Bremerhaven.

DIRECTION DES NORDDEUTSCHEN LLOYD,
Papenstrasse, Bremen.

FREICHT MEMO.

ctal value declared by Shipper:

1,061,718.89

reight at the rate of 5/16 *per cent.*

Prepaid $ 1990.72

rty to be notified:

at

☞ When goods are shipped "to order" it is desirable to have the above mation.

Received, in apparent good

to be transported by the Steamer KRONP

with liberty to call at **Intermediate Ports**

MARKS	NUMBE
N C B	50/
LONDON	

Total Value** (in words) **U. S. Dollars

being marked and numbered as above, shipper's

and thence to be forwarded at steamer's expense,

unto LONDON CITY & MIDLA

Specie for London will be landed
for Paris will be landed at Cherbourg
any other Weser port and will be for

1. IT IS MUTUALLY AGREED that the steamer sh liberty to convey goods in craft and/or lighters to and from mer shall put into a port of refuge, or be prevented from any the goods to their destination by any other steamer; that t perils of the sea or other waters, by fire from any cau pirates or robbers; by acts of theft on sea or land; by arr labor; by explosion, bursting of boilers, breakage of shafts, of the steamer, whether existing at time of shipment or diligence to make the steamer seaworthy; by heating, fou breakage, vermin, or by explosion of any of the goods damage arising from the nature of the goods or the in insufficiency or absence of marks, numbers, address or d damage caused by prolongation of the voyage, and that quality, quantity, gauge, contents, weight, and value. the steamer shall have exercised due diligence to make supplied, it is hereby agreed that in case of danger, dam in the navigation or management of the steamer, or fr worthiness of the steamer, whether existing at time of diligence, the consignees or owners of the cargo shall ship as well as to cargo or for any special charges inc danger, damage or disaster had not resulted from such or unseaworthiness. In case of salvage services rendered same line, such salvage services shall be paid for as fo effects, if any, not to contribute in General Average, but less their proper contribution in such case.

2. ALSO, that this shipment is subject to all the te Act of Congress of the United States, approved on the t vessels, etc."

3. ALSO, that the steamer, lighter and carrier shall United States, unless written notice of the true character or damages which the steamer or cargo may incur or su addressing of packages or description of their content

And finally, in accepting this Bill whether written or printed, as fully as if th

IN WITNESS WHEREOF the agents

Dated in NEW YORK, this July

order and condition, by the **NORTH GERMAN LLOYD,** from THE NATIONAL

INZESSIN CECILIE , now lying in the port of NE

r any port or ports in or out of the customary route in any order, to receive and discha

:S	Total number of cases, kegs, packages, etc.,	
	in figures	in words
O	21	TWENTY ONE KEGS

ONE MILLION SIXTY ONE THOUSAND SEVEN HUNDRE

alue, (quality, quantity, gauge, weight, touch, contents and value unknown), and to be deliv

at at owner's risk, (steamer's responsibility to cease as soon as the goods are free from

BANK LTD, LONDON or to his or their assigns.

t Plymouth or Southampton (as the case may be), and will be forwarded by ra
nd will be forwarded by rail at OWNER'S RISK and at steamer's expen
·ded by rail, river steamer or lighter to Bremen AT OWNER'S RISK and

ave liberty to sail with or without pilots; that the carrier shall have steamer at the risk of the owners of the goods, and, in case the stea- se from proceeding in the ordinary course of her voyage, to transship steamer and carrier shall not be liable for loss or damage occasioned by wheresoever occurring; by barratry of the master or crew; by enemies, and restraint of princes, rulers or people, riots, strikes, or stoppage of latent defect in hull, machinery or appurtenances, or unseaworthiness e beginning of the voyage, provided the owners have exercised due ray, putrefaction, rust, sweat, change of character, drainage, leakage, her shipped with or without disclosure of their nature, or any loss or ity of packages; nor for land damage; nor for the obliteration, errors, ion; nor for risk of craft, hulk or transshipment; nor for any loss or carrier shall not be concluded as to correctness of statements herein of l average payable according to York-Antwerp Rules. If the owner of steamer in all respects seaworthy and properly manned, equipped and disaster resulting from fault or negligence of the master, pilot or crew ient or other defects in hull, machinery or appurtenances, or unsea- ient or at the beginning of the voyage, but not discoverable by due exempted from liability for contribution in General Average, both to ut, with the shipowner, shall contribute in General Average as if such egligence, intent or other defects in hull, machinery or appurtenances, foresaid merchandise or treasure during the voyage by a vessel of the if such saving vessel or vessels belonged to strangers. Passenger's s for passengers' effects sacrificed to be allowed in General Average,

provisions of, and all the exemptions from, liability contained in the y of February, 1893, and entitled "An Act relating to the navigation of

able for articles specified in Section 4281 of the Revised Statutes of the ages thereof is given at the time of lading and entered in the bill of lading. the goods for all freights, primages and charges, and also for all fines eason of the illegal, incorrect or insufficient marking, numbering or of Lading must be made out in accordance with the prescriptions and

regulations of Port, Customs or Consular goods are to be procured by shippers, an such certificates, are to be borne by the sh *not plainly marked with the port of destinat*

5. *ALSO, that the steamer may conn to the contrary notwithstanding, the collec arrival, and if the goods be not taken from or steamer's agent to be at liberty to enter goods shall be deemed delivered and steam payment of all costs and charges so incurred*

6. ALSO, that if on a sale of the goods the carrier shall be entitled to recover the

7. *ALSO, that the steamer has the p any excess must be paid for at the rate o scribed as to the real nature of their content*

8. ALSO, that for metal in slabs, ba loose or in bundles, steamer is responsib weight and/or measurement.

9. *ALSO, that in the event of claim price at the port of destination on the day o is to furnish, if required, satisfactory pro than that declared by the shippers in the carrier from all responsibility. All clai steamer's agent at the port of destination BEFORE the goods are taken delivery of t the place herein before designated, such loss*

10. ALSO, that merchandise on wha happening through the fault or negligenc privileges to the contrary notwithstanding.

11. ALSO, that this Bill of Lading, du

12. ALSO, that the freight is payal or not lost.

13. ALSO, that parcels for different freight on each parcel.

ding, the shipper, owner and consignee of the goods and the holder of the Bill of Ladin re all signed by such shipper, owner, consignee, or holder, any local customs or privileges t

3

e said steamer have affirmed to Bills of Lading, all of this ten

, 1914.

day of 191

AL CITY BANK OF NEW YORK

NEW YORK and bound for ~~Bremen~~ PLYMOUTH

ischarge coal, cargo, passengers, and for any other purposes.

	SAID TO CONTAIN	Actual value declared by shipper.
	U.S. GOLD BARS	$1,061,718.89

RED EIGHTEEN 89/100

delivered in like order and condition at *Plymouth* ~~*Southampton*~~ ~~*Cherbourg*~~ ~~*Bremerhaven*~~

rom the ship's tackles) to LONDON, ~~PARIS,~~ ~~BREMEN,~~

by rail AT OWNER'S RISK and at steamer's expense. Specie expense. Specie for Bremen will be landed at Bremerhaven or and at steamer's expense.

nsular authorities. Consular, Board of Health or other certificates required to accompany the ers, and any detention, charges or penalties occurring to steamer or cargo, owing to the want of the shippers and/or consignees. *Steamer will not be responsible for delay in the delivery of goods ination.*

commence discharging immediately on arrival and discharge continuously, any custom of the port collector of the port being hereby authorized to grant a general order for discharge immediately on from the steamer by the consignee directly they come to hand in discharging the steamer, the master enter and land the goods, or put them into craft or store at the owner's risk and expense, when the steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the urred.

e goods at destination for freight and charges, the proceeds fail to cover said freight and charges, r the difference from the shipper.

the privilege to resolve any goods where reasonable doubt exists as to the correctness of values and rate of freight. The expenses of valuation shall be paid by the party in error. Goods wrongly de- ontents are liable for such additional freight as may be due.

abs, bars, ingots, rods, hoops, plates, etc , or any other articles not packed properly, but shipped ponsible for the total number of pieces or bundles only and not for their respective marks and/or

claims for short delivery when the steamer reaches her destination, the price shall be the market day of the steamer's entry at the Custom House, less all charges saved. In case of loss the claimant ry proof of value, and the steamer or carrier shall in no case be responsible for a greater value in the margin, also that incorrect or wrong declaration of the shipment shall release the steamer or ll claims for short delivery, loss, damage, or of whatever nature, must be made in writing to the nation of the goods, within 5 days after the steamer or lighter finished discharging and ALWAYS ry of by the consignee, and in case such claims shall not be presented in writing within the time and h loss or damage shall be deemed to be waived and the steamer discharged therefrom.

n wharf or lighter awaiting shipment or delivery be at shipper's risk of loss or damage not gligence of the owner, master, agent or manager of the steamer or lighter, any local customs or nding.

ing, duly endorsed, be given up to the steamer's agent in exchange for a delivery order.

payable on the actual value before shipment. Freight prepaid will not be returned, goods lost

fferent consignees collected or made up in single packages addressed to one consignee pay full

ading agree to be bound by all of its stipulations, exceptions and conditions, ges to the contrary notwithstanding.

s tenor and date, one of which being accomplished, the others to stand void.

For OELRICHS & CO., Agents,

517 EXHIBIT "B".

THE NATIONAL CITY BANK OF NEW YORK.

New York, August 10, 1914.

North German Lloyd,
Mess. Oelrichs & Co., General Agents,
5 Broadway, New York City.

Dear Sirs:

518 We shipped on the steamship *Kronprinzessin Cecilie* which sailed from this port on or about the 28th day of July last, 21 kegs of gold bars marked N. C. B. London, Nos. 50/70, consigned to London City & Midland Bank, London, England, declared by us to be of the actual value of $1,061,718.89, and 40 kegs of gold bars marked N. C. B. Paris, Nos. 1/40, consigned to Credit Lyonais, at Paris, declared by us to be of the actual value of $2,104,254.34.

519 We understand and admit that the *Kronprinzessin Cecilie* owing to the outbreak of the war in Europe, returned to the port of Bar Harbor, Maine, where she now lies, and that the continuation of her voyage to the port or ports of original destination has been indefinitely postponed, and that in accordance with the terms of an agreement between us, evidenced by your letter to us and our reply to same, both dated the 7th inst., the consignments of gold above mentioned have
520 been brought to New York, at our risk and expense, and have been deposited in the U. S. Sub. Treasury in the City of New York, subject to your order.

We request that both of said shipments be redelivered to us here. We are the New York correspondents of the London City and Midland Bank and are authorized to accept delivery of the gold consigned to it, and we have also been

Exhibit B.

521

authorized by the Credit Lyonnais to accept delivery here of the gold consigned to it.

We surrender herewith the full sets of bills of lading for both of said shipments and agree on our behalf and on behalf of the said consignee, that upon your making delivery to us here of said shipments, we will indemnify and hold you harmless against all suits, claims or demands by any 522
other persons claiming any right, title or interest, legal or equitable in either of said shipments or in any part thereof; provided however that nothing hereinabove contained shall be deemed to constitute a waiver or release of any claim we have or may have against you or against said Steamship by reason or on account of said Steamship having returned to the United States; nor shall the acceptance of the above by you constitute an admission that such return was not justified. 523

Yours respectfully,

(Signed) JOHN E. GARDIN,
Vice-President.

Attest (Signed) H. W. KILBORN, V. Pt.

524

HE NATIONAL CITY BANK OF NEW YORK

the port of NEW YORK and bound for ~~Bremen~~ CHERBOURG, FRANCE.
eceive and discharge coal, cargo, passengers, and for any other purposes.

	SAID TO CONTAIN	Actual value declared by shipper.
	U S GOLD BARS	$ 2,104,254.34

USAND TWO HUNDRED FIFTY FOUR 34/100 DOLLARS

own), and to be delivered in like order and condition at ~~Plymouth~~ ~~Southampton~~ ~~Cherbourg~~ ~~Bremerhaven~~

ods are free from the ship's tackles) to ~~LONDON~~, PARIS, ~~BREMEN~~,

e forwarded by rail AT OWNER'S RISK and at steamer's expense. Specie steamer's expense. Specie for Bremen will be landed at Bremerhaven or NER'S RISK and at steamer's expense.

ort, Customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the procured by shippers, and any detention, charges or penalties occurring to steamer or cargo, owing to the want of are to be borne by the shippers and/or consignees. *Steamer will not be responsible for delay in the delivery of goods d with the port of destination.*

hat the steamer may commence discharging immediately on arrival and discharge continuously, any custom of the port otwithstanding, the collector of the port being hereby authorized to grant a general order for discharge immediately on he goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master t to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the emed delivered and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the ts and charges so incurred.

at if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, be entitled to recover the difference from the shipper.

hat the steamer has the privilege to revalue any goods where reasonable doubt exists as to the correctness of values and to be paid for at the rate of freight. The expenses of valuation shall be paid by the party in error. Goods wrongly de- eral nature of their contents are liable for such additional freight as may be due.

hat for metal in slabs, bars, ingots, rods, hoops, plates, etc., or any other articles not packed properly, but shipped les, steamer is responsible for the total number of pieces or bundles only and not for their respective marks and/or easurement

hat in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market of destination on the day of the steamer's entry at the Custom House, less all charges saved. In case of loss the claimant required, satisfactory proof of value, and the steamer or carrier shall in no case be responsible for a greater value ed by the shippers in the margin, also that incorrect or wrong declaration of the shipment shall release the steamer or responsibility. All claims for short delivery, loss, damage, or of whatever nature, must be made in writing to the at the port of destination of the goods, within 5 days after the steamer or lighter finished discharging and ALWAYS ods are taken delivery of by the consignee, and in case such claims shall not be presented in writing within the time and efore designated, such loss or damage shall be deemed to be waived and the steamer discharged therefrom.

that merchandise on wharf or lighter awaiting shipment or delivery be at shipper's risk of loss or damage not gh the fault or negligence of the owner, master, agent or manager of the steamer or lighter, any local customs or contrary notwithstanding.

that this Bill of Lading, duly endorsed, be given up to the steamer's agent in exchange for a delivery order.

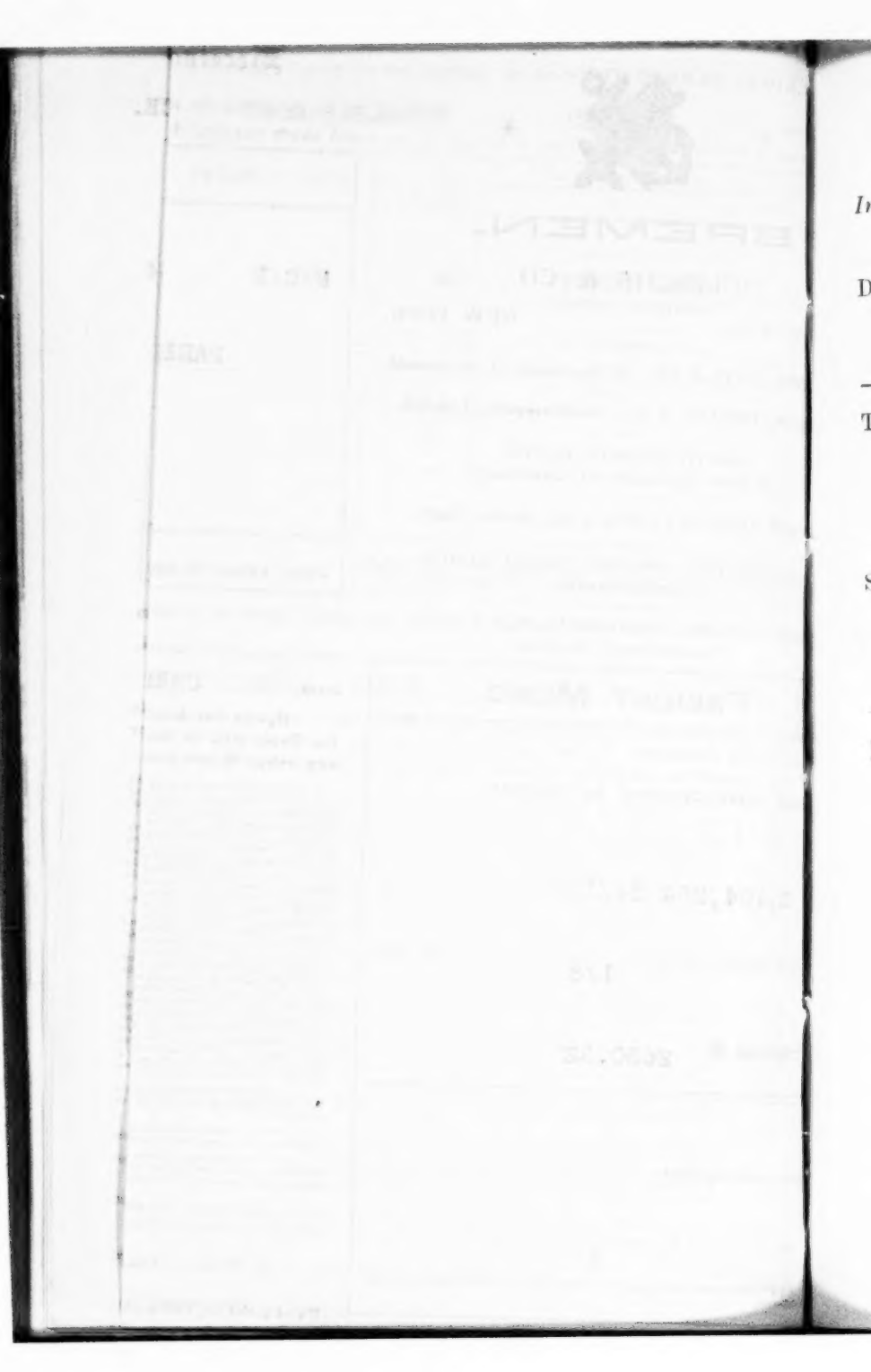
that the freight is payable on the actual value before shipment. Freight prepaid will not be returned, goods lost

that parcels for different consignees collected or made up in single packages addressed to one consignee pay full parcel.

of the Bill of Lading agree to be bound by all of its stipulations, exceptions and conditions, ustoms or privileges to the contrary notwithstanding.

ading, all of this tenor and date, one of which being accomplished, the others to stand void.

For OELRICHS & CO., Agents,



Interrogatories of National City Bank and Claimant's Answers. 529

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MASSACHUSETTS.

THE NATIONAL CITY BANK OF NEW YORK,
Libelant,

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, &c.
NORTH GERMAN LLOYD,
Claimant.

530

Interrogatories addressed to Claimant annexed to the Libel, and Claimant's Answers thereto. 531

[These interrogatories and answers are identical with the interrogatories and answers in the libel of Rantoul *ante*, pp. 58-78.]

Verification by C. von Helmolt December 11, 1914.

532

Filed December 12, 1914.

533 *Amended Libel of National City Bank.*

To the Honorable James M. Morton, Jr., United States District Judge, for the District of Massachusetts:

The amended libel and complaint of The National City Bank of New York against the Steamship *Kronprinzessin Cecilie*, her engines, boilers, tackle, apparel and furniture, in a cause of con-
534 tract, civil and maritime, alleges, on information and belief, as follows:

FIRST, FOR A FIRST CAUSE OF ACTION.

FIRST: The libelant is now, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the United States, having its office in the City and State of New York.

535 SECOND: The steamship *Kronprinzessin Cecilie*, is a German vessel owned by the North German Lloyd, a corporation existing under the laws of the Empire of Germany. The steamship is now lying in the port of Boston, within this district. At the times hereinafter mentioned the *Kronprinzessin Cecilie* was operating as a common carrier of passengers and cargo between the ports of New York City, in New York, Plymouth, in
536 England, Cherbourg, in France, and Bremen, in Germany.

THIRD: On or about July 27, 1914, the libelant delivered to and shipped on board the steamship *Kronprinzessin Cecilie*, then lying in the port of New York, bound for Bremerhaven, Germany, via Plymouth, England, in good order and condition, twenty-one kegs of Gold Bullion, marked N.C.B. London, 50-70, of the agreed and declared value

of One million, sixty-one thousand, seven hundred eighteen 89/100 Dollars ($1,061,718.89), to be carried and transported by the said steamship *Kronprinzessin Cecilie,* as a common carrier, to Plymouth, England, thence to be forwarded to London, at Steamer's expense, and there to be delivered, in like good order and condition as when shipped, unto the London City and Midland Bank, 538
Ltd., for the account of the shipper, this libelant, in consideration of freight in the sum of One thousand, nine hundred ninety 72/100 Dollars ($1,990.72), which was prepaid at the time of the said shipment. The owner of the steamship thereupon duly delivered to this libelant a certain bill of lading binding said steamship to transport and deliver the gold as aforesaid.

FOURTH: Thereafter, and about 1 A. M., on 539
July 28, 1914, the steamship *Kronprinzessin Cecilie* proceeded on her voyage from New York to Plymouth, England. The distance covered by the steamship, the conditions of weather from day to day, and the latitude and longitude, as ascertained at noon of each day, were announced to the passengers by the officers of the steamship as follows:

Abstract of Log.

July 1914	Miles	Lat. N.	Long. W.	Remarks. 540
28	196	40° 10′	69° 35′	Overcast; rainy, light sea.
29	535	40° 10′	57° 55′	Cloudy; moderate sea.
30	534	40° 15′	46° 22′	Cloudy; hazy, moderate sea.
31	549	45° 25′	35° 36′	Cloudy; moderate sea.

Distance till noon 1814 miles.

541 *Amended Libel of National City Bank.*

About 10.15 P. M., on Friday, July 31, 1914, the steamship *Kronprinzessin Cecilie* was about 900 miles from Plymouth. She then turned back on her course, abandoning the voyage to Plymouth and proceeded toward the United States.

FIFTH: About 10.30 P. M., on the evening of July 31, 1914, Charles Polack, the master of the
542 steamship, entered the smoking room of the steamship and announced to the passengers who were there assembled that he had just received a wireless message from his owners informing him that war had been declared between Germany, Russia, France and England, and instructing him to return at once to America. He also said that the steamer had already turned around and was proceeding back to America.

543

SIXTH: The action of the master in turning the vessel on her course and proceeding back to America was taken pursuant to the instructions received by him from his owners, as hereinabove set forth.

SEVENTH: Thereafter the steamship *Kronprinzessin Cecilie* continued on her way toward the United States and arrived and anchored at Bar
544 Harbor, Maine, on the early morning of August 4, 1914, and was ordered by her owners to remain there indefinitely. She was convoyed by vessels of the United States to the port of Boston on November 6, 1914.

EIGHTH: In fact, war had not been declared and did not exist between Germany, Russia, England and France, on July 31, 1914, nor between

any two of those countries or governments. The first declaration or state of war took place between Germany and Russia on August 1, 1914. War was declared between England and Germany on August 4, 1914, about 11 P. M. and between Germany and France about 6.45 P. M. on August 3, 1914. England, France and Russia are not and have not been at war with one another at any time in the year 1914.

NINTH: If the steamship *Kronprinzessin Cecilie* had not turned back on her course on July 31, 1914, but had proceeded on her voyage to Plymouth, she would have arrived at Plymouth in ordinary course during the afternoon of Sunday, August 2, 1914, and would have discharged her cargo for that port on the same day, and the said shipment would have been received by the London City and Midland Bank, Ltd., so as to be available for account of this libelant in London in the ordinary course on August 4, 1914.

TENTH: The instructions by the owners of the *Kronprinzessin Cecilie* to the master, on July 31, 1914, to proceed back to America at once, were wrongful and improper. The action of the master in turning the steamship on her course and proceeding back toward America constituted a wrongful deviation and abandonment of the voyage and a breach of the contract between the libelant and the owners of the steamship.

ELEVENTH: The said steamship, in violation of its duty, has failed and refused to carry and transport the said kegs of gold to Plymouth, England, and there deliver and forward the same in

accordance with the terms of the aforesaid contract with libelant.

TWELFTH: In view of the wrongful abandonment of the voyage and of the deviation of the steamer to Bar Harbor, Maine, and of the indefinite postponement of her further movements, the libelant, on or about August 10, 1914, accepted re-
550 delivery of said twenty-one (21) kegs of gold from the steamship *Kronprinzessin Cecilie,* upon an agreement with the owner of said vessel, through their duly-constituted general agents at New York, that such redelivery of the gold should not constitute a waiver of or in any way prejudice the libelant's claim against said steamship arising from the failure to deliver the gold in England in accordance with the terms of the
551 bill of lading.

THIRTEENTH: By reason of the failure of the steamship *Kronprinzessin Cecilie* to deliver the said gold in England, in accordance with the bill of lading, the libelant has incurred expenses in the sum of Four thousand, six hundred eighty-two 02/100 Dollars ($4,682.02), and has suffered further damages exceeding the sum of Four hundred, four thousand, one hundred fifty 06/100 Dollars
552 ($404,150.06), no part of which has been paid, although duly demanded of the steamship, and her owner.

FOURTEENTH: All and singular the premises of this libel are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

SECOND, FOR A SECOND CAUSE OF ACTION.

FIRST: The libelant repeats and realleges each and every allegation contained in Articles First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Fourteenth of the foregoing First Cause of Action.

SECOND: On or about July 27, 1914, the libelant delivered to and shipped on board the steamship *Kronprinzessin Cecilie,* then lying in the port of New York, bound for Bremerhaven, Germany, via Plymouth, England, and Cherbourg, France, in good order and condition, forty (40) kegs of gold bullion, marked N. C. B., Paris, 1-40, of the agreed and declared value of Two million, one hundred four thousand, two hundred fifty-four 34/100 Dollars ($2,104,254.34), to be carried and transported by the said steamship *Kronprinzessin Cecilie,* as a common carrier, to Cherbourg, France, thence to be forwarded at steamer's expense to Paris, France, and there to be delivered, in like good order and condition as when shipped, unto the Credit Lyonnais, for the account of the shipper, this libelant, in consideration of freight in the sum of Two thousand, six hundred thirty 32/100 Dollars ($2,630.32), which was prepaid at the time of the said shipment. The owner of the steamship thereupon duly delivered to the libelant a certain bill of lading binding said steamship to transport and deliver the gold as aforesaid.

554 555 556

THIRD: If the steamship *Kronprinzessin Cecilie* had not turned back on her course on July 31, 1914, but had proceeded on her voyage to Cherbourg, she would have arrived at Cherbourg in ordinary course about midnight of Sunday, August 2, 1914,

553

and would have discharged her cargo for that port soon thereafter, and long before the declaration of war between Germany and France hereinbefore referred to; and the said shipment would have been received by the Credit Lyonnais, so as to be available for account of this libelant in Paris in the ordinary course, on August 4, 1914.

558 FOURTH: The said steamship, in violation of its duty, has failed and refused to carry and transport the said kegs of gold to Cherbourg, France, and there to deliver and forward the same in accordance with the terms of the aforesaid contract with libelant.

FIFTH: In view of the wrongful abandonment of the voyage and of the deviation of the steamer
559 to Bar Harbor, Maine, and of the indefinite postponement of her further movements, the libelant, on or about August 10, 1914, accepted re-delivery of said forty (40) kegs of gold from the steamship *Kronprinzessin Cecilie,* upon an agreement with the owner of said vessel, through their duly-constituted general agents at New York that such re-delivery of the gold should not constitute a waiver of or, in any way prejudice the libelant's
560 claim against said steamship arising from the failure to deliver the gold in France in accordance with the terms of the bill of lading.

SIXTH: By reason of the failure of the steamship *Kronprinzessin Cecilie* to deliver the said gold in France in accordance with the bill of lading, the libelant has incurred expenses in the sum of Eight thousand, eight hundred one 39/100 Dollars ($8,801.39), and has suffered further dam-

ages exceeding the sum of Twenty-nine thousand one hundred ninety-five 00/100 Dollars ($29,195), no part of which has been paid, although duly demanded of the steamship and her owner.

WHEREFORE, the libelant, The National City Bank of New York, claiming a lien upon said steamship *Kronprinzessin Cecilie,* by reason of the 562
premises for the sum of Four hundred forty-six thousand, eight hundred twenty-eight 47/100 Dollars ($446,828.47), now due to it and unpaid as set forth prays,

1. That process *in rem* in due form of law according to the course and practice of this Court in proceedings in admiralty issue forthwith against the said steamship *Kronprinzessin Cecilie,* her engines, boilers, tackle, apparel and furniture, and 563
that said steamship be arrested and seized thereunder.

2. That all persons having any interest in the said steamship, her engines, boilers, tackle, apparel and furniture, may be cited and summoned to appear and answer in the premises.

3. That the Court will decree in favor of the libelant, The National City Bank of New York, against the steamship *Kronprinzessin Cecilie* for 564
the amount of its damages as claimed in this amended libel, with interest from August 4, 1914, together with the costs and disbursements of this action.

4. That the said steamship *Kronprinzessin Cecilie* may be ordered by the Court to be condemned and sold and the proceeds of said sale applied to the said claim of the libelant.

565 *Amended Libel of National City Bank.*

5. That the owner or claimant of the steamship *Kronprinzessin Cecilie* be required to answer in writing and under oath the amended interrogatories annexed to this amended libel, and to produce all documents demanded by said amended interrogatories.

6. That the Court will grant to the libelant
566 such other and further relief as shall be just in the premises.

SHEARMAN & STERLING,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libelant.

Verification by John E. Gardin, vice-president, February 4, 1915.

Filed February 10, 1915.
567

568

Claimant's Answer to Amended Libel of National City Bank. 569

UNITED STATES DISTRICT COURT.

DISTRICT OF MASSACHUSETTS.

THE NATIONAL CITY BANK OF NEW YORK,
Libelant,

570

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, etc.,
NORTH GERMAN LLOYD,
Claimant.

By stipulation the answer of the claimant is amended in the following particulars, and as amended is to stand as claimant's answer to the amended libel. 571

The following paragraph is inserted immediately preceding the last paragraph of folio 23:

"It denies on information and belief that the Steamship *Kronprinzessin Cecilie*, if she had not turned back on her course on July 31st, and had proceeded on her voyage to Cherbourg, would have arrived at Cherbourg in ordinary course about midnight of Sunday, August 2, 1914, or that she would have discharged her cargo for that port soon thereafter, and in that behalf it denies any knowledge or information as to whether said steamship would ever have arrived at said port or as to when, if she had arrived, the shipment in question would have been received by the Credit Lyonnais, or been available for the account of the libelant in Paris." 572

573 *Interrogatories Annexed to Claimant's Answer propounded to Libelant and its Answers.*

In the last paragraph of folio 23 the word "Third" is stricken out, and in lieu thereof the word "Fourth" is inserted.

CHOATE, LABOCQUE & MITCHELL,
Proctors for Claimant,
40 Wall Street,
New York City.

574

Interrogatories Annexed to Claimant's Answer propounded to Libelant and its Answers.

First Interrogatory: In the Thirteenth Article of the first alleged cause of action, and the Fifth Article of the Second alleged cause of action of your libel, it is stated that the libelant has suffered damages exceeding the sums of $404,150.06 and $32,007.43 respectively. Please set forth sep-
575 arately and in detail the computations by which you arrive at these sums, showing fully the manner in which the alleged damages are claimed to have resulted, and annex to your answer as a part thereof copies of all correspondence or written or telegraphic communications between your company, its officers, agents or attorneys and the consignees, their officers, agents or attorneys and also third parties, in any way relating to the gold in
576 question, covering the period prior to the shipment when the sending of the gold abroad was first considered and continuing down to the time of the arrival of the steamer at Bar Harbor, excluding correspondence or communications between your company and its legal counsel. Please state in your answer that all correspondence and communications called for by this interrogatory have been so annexed.

Filed March 29, 1915.

Claimant's Interrogatories and Answers of National City Bank. 577

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF MASSACHUSETTS.

THE NATIONAL CITY BANK OF NEW YORK, Libelant, 578

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, etc., NORTH GERMAN LLOYD, Claimant. 579

Answer To the First Interrogatory.

A. Gold Shipped to London by "Kronprinzessin Cecilie," July 27, 1914.

The computations by which the libelant arrived at the sum of $408,832.08 as the amount of damages suffered by it on the shipment of gold consigned to the London City & Midland Bank, Limited, London, are as follows: 580

The libelant has incurred actual expense in connection with the said shipment for which it should be reimbursed herein, as follows:

581

Freight	1,990.72		
Less refund	331.79	1,658.93	
Insurance		481.75	
Cooperage		42.00	
Cartage		21.00	
Petties		1.00	
582 14 days' interest, July 27 to Aug. 10, 1914, on $1,061,718.89 at 6%.		2,477.34	$4,682.02
In addition to the above expenses, the libelant has suffered damages on the said shipment of			404,150.06
583 Total expenses and damages,			$408,832.08

The said damages are computed as follows:

Bank of England minimum price for gold bars 77s. 9d. per oz. 11/12 fine

Gold Bars *Kronprinzessin Cecilie* averaged 999.5 fine.

51,386,09 oz., 999.5 fine, valued at $1,061,718.89.

584 51,386.09 oz., x 999.5 = 51,360.397 fine gold.

51,360,397 oz. fine gold = 56,029.524 standard gold.

56,029.524 oz. standard gold at 77s. 9d. = £217,814.15.6 the value of the gold in Pounds Sterling. Its value in dollars at $6.75 per Pound Sterling, which was the prevailing

Claimant's Interrogatories and Answers of National City Bank. 585

rate of exchange on August 4, 5 or 6, 1914, was $1,470,249.68

From this sum should be deduted the cost of the gold and the expense to the libelant of transporting it to London, as follows:

Cost of Gold Bars...	$1,061,718.89	586
Premium on Gold Bars for export, ...	424.69	
Freight	1,990.72	
Insurance	481.75	
Cooperage	42.00	
Cartage	21.00	
Petties	1.00	
	$1,064,680.05	
8 days int. July 27th to Aug. 4, 1914, on $1,064,680.05 at 6%	1,419.57	587
	1,066,099.62	
Damages to National City Bank	$404,150.06	

B. Gold Shipped to Paris by Kronprinzessin Cecilie July 27, 1914.

The computations by which the libelant arrived at the sum of $37,996.39 as the amount 588
of the damages suffered by it on the shipment of gold consigned to the Credit Lyonnais, at Paris, are as follows:

The libelant has incurred actual expense in connection with the said shipment, for which it should be reimbursed herein, as follows:

589 *Claimant's Interrogatories and Answers of National City Bank.*

Premium on Gold Bars.....	$841.71	
Freight $2,630.32		
Less Refund 657.58	1,972.74	
Insurance	954.00	
Cooperage	80.00	
590 Cartage and Petties	43.00	
14 days' interest July 27 to Aug. 10, 1914 on $2,104,254.34 at 6%.....	4,909.94	$8,801.39
In addition to the above expenses, the libelant has suffered damages on the said shipment of		29,195.00
Total expenses and damages		$37,996.39

591

The said damages are computed as follows:

The Banque de France pays 3437 Francs per Kilogram of gold 1000 fine.

1 Kilogram = 32.1507 Troy ounces.

Gold bars shipped by S. S. *Kronprinzessin Cecilie* averaged .999551 fine.

These bars weighed 101,839 Troy ounces and were worth $2,104,254.34 (Assay office Statement).

592

101,839 Troy ounces = 3167.551 Kilograms.

3437 Francs times 3167.551 Kilograms times .999551 fineness = 10,881,984.58 Francs, the value of the gold in Francs.

Cost of Francs purchased by libelant at first opportunity so as to minimize damages:

881,984.58 Francs at .20 per Franc (5 francs per

Claimant's Interrogatories and Answers of National City Bank. 593

	dollar) on August 11, 1914	$176,396.92
10,000,000.	Francs at .196078431¢ per Franc (5.10 francs per dollar) on August 15, 1914..	1,960,784.31
10,881,984.58	Francs Cost	$2,137,181.23 594
	Plus penalty for overdraft, August 4th to Aug. 18th, 1914, the date when the gold purchased on Aug. 11 and Aug. 15, 1914, as above stated, was delivered to the Credit Lyonnais, 14 days at 5%	4,155.63
	Total cost of Francs in Paris	$2,141,336.86 595

From this sum should be deducted the cost of the gold and the expense to the libelant of transporting it to Paris, as follows:

Cost of Gold Bars....	$2,104,254.34	
Premium on Gold Bars for export	841.71	
Freight ⅛%	2,630.32	
Insurance	954.00	596
Cooperage	80.00	
Cartage and Petties...	43.00	
Commission for handling in Paris, one-fortieth per cent.	526.06	
	$2,109,329.43	
8 days' interest July 27 to Aug. 4, 1914, on $2,109-329.43 at 6%	2,812.43	2,112,141.86

597 *Correspondence.*

The following are copies of all correspondence and written or telegraphic communications between the libelant, its officers, agents or attorneys, and the consignees of the said shipments, their officers, agents or attorneys, in any way relating to the gold in question, covering the period prior to the shipment, when the sending of the gold abroad was first considered, and continuing
598 down to the time of the arrival of the steamer at Bar Harbor, excluding correspondence or communications between the libelant and its attorneys or its legal counsel:

1. Copy of cablegram sent by libelant to Credit Lyonnais, Paris, July 24, 1914:

> "Will you advance further 10,000,000 against shipment of per gold *Kaiser Wilhelm II.*"

599

2. Copy of cablegram received by the libelant from Credit Lyonnais, Paris, July 25, 1914:

> "Refer to your telegram of the 24th will advance 10,000,000, 5% net, Commission 1/40%, against shipment of per *Kronprinzessin Cecilie* but not *Kaiser Wilhelm Second.*"

3. Copy of portion of cablegram relating to the gold in question sent by libelant to Credit Lyon-
600 nais, Paris, July 25, 1914:

> "We accept your offer 10,000,000 Francs advance against shipment of gold per S. S. *Kronprinzessin Cecilie.*"

601

4. Copy of letter from libelant to Credit Lyonnais, Paris, dated July 25, 1914:

"Credit Lyonnais,
Paris.

Dear Sirs:—

We confirm our exchange of cables with the result that we have secured from your good selves Frs. 10,000,000—advance against 602
shipment of gold per S. S. *Kpr. Cecilie,* at the rate of 5% per annum with the usual commission of ¼ per mille for handling.

The bills of lading and other documents have gone forward to you direct, in a separate letter.

We are wiring you again to-day to see whether a further advance against a gold shipment would be agreeable, as there is considerable demand here for cable transfers. 603

We beg to remain,
Yours very truly,
L. J. BURNES,
Assistant Manager."

LJB H

5. Copy of portion of cablegram relating to the gold in question sent by libelant to London City & Midland Bank, London, July 27, 1914: 604

"Shipping $1,000,000 gold bars *Cecilie.* Have insured here."

6. Copy of letter from libelant to London City & Midland Bank, Ltd., London, E. C., dated July 27, 1914:

605 *Correspondence.*

"London City & Midland Bank, Ltd.,
London, E. C.,
England.

Dear Sirs:

We beg to advise you that we are shipping to you today, insured, by the S. S. *Kronprinzessin Cecilie*, 21 kegs containing 102 (One Hundred Two) bars of gold, the proceeds of which we would ask you to please place to our account with your good selves.

606

We are enclosing herewith the original bill of lading together with an abstract of the U. S. Assay accounting showing the details of these bars.

Please let us have a statement showing your charges together with the figures given to you by the Bank of England.

607 Respectfully yours,

K/MIL LEO J. BURNES."

The above letter was mailed by the libelant in New York on the day of its date, and was included in the mails, which were carried on the Steamship *Kronprinzessin Cecilie* on her sailing July 28, 1914. On her return to Bar Harbor, the said letter with its enclosure was returned to the libelant by the post office authorities at New York

608 City, in order that the original bill of lading enclosed therein might be surrendered to the North German Lloyd when the said gold was returned to the libelant on August 10, 1914. The letter was accordingly never received by the London City & Midland Bank, Ltd.

7. Copy of statement issued by the United States Assay Office at New York, of gold bars exchanged by it with the libelant for gold coin on

609

July 27, 1914. These gold bars were shipped to the London City & Midland Bank, Ltd., London, on that day by the libelant per S. S. *Kronprinzessin Cecilie*:

mbers.	Bars.	Gross Weight. Ounces.	Dec.	Fineness.	Value.
9	15	7,538	97	999.6	$155,782.00
7	18	9,417	38	999.6	194,596.65
2	15	7,540	67	999.4	155,785.96
406	14	6,871	31	999.4	141,957.36
0	14	6,991	08	999.5	144,446.19
3	13	6,624	19	999.5	136,865.69
6	13	6,402	49	999.5	132,285.04
	102	51,386	09		$1,061,718.89"

610

8. Copy of letter from libelant to Credit Lyonnais, Paris, dated July 27, 1914:

611

"CREDIT LYONNAIS,
Paris, France.

Dear Sirs:

We confirm our interchange of cables, and in accordance therewith are shipping you today, per S. S. *Kronprinzessin Cecilie*

40 kegs marked NCB PARIS 1/40

containing 197 gold bars.

Please credit the proceeds of this shipment to our account and forward us your statement of your charges, together with the accounting of the Bank de France.

612

We enclose the original bill of lading,—duplicate of which will be forwarded to you by a subsequent mail—together with abstract of the United States Assay Certificate, showing the details of these bars.

We remain

Yours truly,

T-am L. J. BURNES."

613 *Correspondence.*

9. Copy of statement issued by the United States Assay Office at New York, of gold bars exchanged by it with the libelant for gold coin, on July 27, 1914. These gold bars were shipped to the Credit Lyonnais, Paris, on that date, by the libelant per S. S. *Kronprinzessin Cecilie*:

"Bar numbers.	Bars.	Gross Ounces.	Weight. Dec.	Fineness.	Va
614 439-54	16	8,321	67	999.7	$171,9
455-74	20	10,189	79	999.6	210,3
475-90	16	8,399	87	999.5	173,3
491-503	13	6,801	94	999.6	140,3
504-15	12	6,191	87	999.6	127,8
516-32	17	8,828	07	999.6	182,4
533-45	13	6,786	04	999.5	140,3
546-56	11	5,742	53	999.6	118,6
557-73	17	8,871	64	999.5	183,3
615 574-89	16	8,119	92	999.5	167,7
590-601	12	6,136	72	999.6	126,8
602-617	16	8,309	22	999.4	171,6
618-35	18	9,139	72	999.5	188,8
Total,	197	101,839	00		$2,104,3

10. Copy of portion of letter relating to the gold in question from Credit Lyonnais to libelant, dated July 27, 1914.

616

"Refer to your telegram of 24th, will advance Frs. 10,000,000, interest 5%, commission 1/40%, against shipment of gold per *Kronprinzessin Cecilie* but not *Kaiser Wilhelm II.*"

Second Interrogatory.—Please state fully and in detail what if any transfer or disposition was made of the gold contained in each of the ship-

617

ments referred to in the libel after its redelivery to you by the claimant, and on what terms and conditions and under what circumstances it was ultimately transferred or disposed of, and annex to your answer as a part thereof copies of all correspondence or written or telegraphic communications between your company, its officers, agents or attorneys and the consignees, their officers, agents or attorneys and also third parties, in any way relating to the said gold or the damages claimed to have been suffered by you, covering the period from the time the said steamer arrived at Bar Harbor down to the time of your answer to this interrogatory, excluding correspondence or communications between your company and its legal counsel. Please state in your answer that all correspondence and communications called for by this interrogatory have been so annexed.

618

619

Answer to the Second Interrogatory:

A. Shipments consigned to London City & Midland Bank, Ltd.

This gold was returned by the libelant to the United States Assay Office in New York City on August 12, 1914, and the libelant received in cash therefor, the sum of $1,061,718.89 and also received a refund of the premium paid for the gold bars, amounting to $424.69.

620

B. Shipment to Credit Lyonnais, Paris.

After this gold was redelivered to the libelant, on or about August 10, 1914, as alleged in the libel, it was stored in the original kegs, with the seals unbroken, in the vaults of the libelant, at 55 Wall Street, New York City, where it now remains.

621 *Correspondence.*

The following are copies of all correspondence and written or telegraphic communications between the libelant, its officers, agents or attorneys, and the consignees of the said shipments, their officers, agents or attorneys, in any way relating to the said gold or the damages claimed to have been suffered by the libelant, covering the period from the time the said steamer arrived at Bar Harbor
622 down to the time of the answers to this interrogatory, excluding correspondence or communications between the libelant and its legal counsel:

1. Copy of cablegram sent by libelant to London City & Midland Bank, Ltd., London, August 4, 1914:

"Gold Steamship Cecilie being unloaded here. We will take possession for your ac-
623 count unless otherwise instructed by you. Wire us authority to endorse bills of lading if necessary."

2. Copy of cablegram sent by libelant to Credit Lyonnais, Paris, August 4, 1914:

"Gold Steamship *Cecilie* being unloaded here. We will take possession for your account unless otherwise instructed by you.
624 Wire authority your representative to endorse bills of lading if necessary."

3. Copy of portion of cablegram relating to the gold in question received by libelant from Credit Lyonnais, Paris, dated August 6, 1914:

"Sheppard will endorse you bill of lading gold your shipment."

625

4. Copy of portion of letter relating to the gold in question received by libelant from Credit Lyonnais, Paris, dated August 6, 1914:

"National City Bank,
New York,

Dear Sirs:

In consequence of the S. S. *Kronprinzessin Cecilie* having returned to Bar Harbor with her gold shipment, we cabled you yesterday as follows:

626

'Sheppard will endorse you bill of lading gold your shipment.'

We remain, Dear Sirs,
Yours faithfully,
de Juge,
Asst. Manager.''

627

5. Copy of portion of cablegram relating to gold in question sent by libelant to Credit Lyonnais, August 8, 1914:

"Have made all necessary arrangements to take possession of gold at sub-treasury on Monday."

6. Copy of letter from libelant to H. Sheppard, Representative of Credit Lyonnais, Paris, dated August 10, 1914:

628

"H. Sheppard, Esq.,
Representative Credit Lyonnais, Paris, France,
52 William Street, New York City.

Dear Sir:

We beg to advise you that we have received and stored tonight in our vaults forty kegs,

said to contain one hundred and ninety seven gold bars said to be valued at $2,104,254.34 (Two million one hundred and four thousand two hundred and fifty-four dollars, thirty-four cents), which were originally consigned to your Paris office, on the steamship *Kronprinzessin Cecilie.*

Yours respectfully,

J. T. Cosby,

GAK MGR.

7. Copy of statement issued by the United States Assay Office at New York, relating to gold in question, sent by libelant to the London City & Midland Bank, Limited, London, dated August 12, 1914:

"Memorandum of gold bullion deposited at the U. S. Assay Office at New York, on August 12, 1914, by National City Bank.

	WEIGHT *Before melting.*		FINENESS *After melting*		GOLD		
	Oz.	Dec	Oz.	Dec	1000's	Value	Net V
Redeposited	7538	97	7538	97	999.6	155782.09	15578
Denver Mint Bars	9417	38	9417	38	999.6	194596.65	19459
	7540	67	7540	67	999.4	155785.96	15578
Melts 188-94	6871	31	6871	31	999.4	141957.36	14195
	6991	08	6991	08	999.5	144446.19	14444
	6624	19	6624	19	999.5	136865.69	13686
	6402	49	6402	49	999.5	132285.04	13228
	51386	09	51386	09		1061718.89	10617

I certify that the net amount of the above deposit is Ten hundred sixty-one thousand seven hundred and eighteen 89/100 Dollars,

633

payable at the U. S. Assay Office at New York, only on surrender of the receipt of a corresponding date and number heretofore issued. viz.:

By Check, $1,061,718.89,
F. W. Braddock,
For the Superintendent."

8. Copy of portion of cablegram relating to the gold in question received by libelant from Credit Lyonnais, Paris, dated August 17, 1914: 634

"KP748 Paris 42
National City Bank, N. Y.
Recumes Dixmillions Francs Morgan Harjes.
Huitcentmille Francs Farmers Loan.
Credit Lyonnais"

635

Translation:

"Received ten million Francs Morgan Harjes eight hundred thousand Francs Farmers' Loan."

9. Copy of letter relating to the gold in question received by libelant from Credit Lyonnais, Paris, dated September 14, 1914:

"Paris, September 14th, 1914. 636

National City Bank,
New York.

Dear Sirs:

Our New York Representative, Mr. Sheppard, has given us a full report of the entire proceedings you took in order to assist us obtaining delivery of our gold shipments ex *Kronprinzessin Cecilie.*

637 We wish to tender you our sincerest thanks for the care you have taken of our interests in these circumstances.

Reckoning that you may have sustained a loss in connection with this affair, we have decided to charge you debit interest at the rate of 5% only.

638 We assure you that we are most grateful for all you have done to help us and settle in a satisfactory way this difficult matter.

We remain, Dear Sirs,
Very truly yours,
Credit Lyonnais,
Le sous Directeur,
F. R. Conradi."

639 The National City Bank of New York,
By
John E. Gardin,
Vice-President.

Verification by John E. Gardin February 23, 1915.

Filed February 25, 1915.

640

DISTRICT COURT OF THE UNITED STATES 641

DISTRICT OF MASSACHUSETTS.

HALE, J.

GUARANTY TRUST COMPANY,
Libelant,

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, etc.,
NORTH GERMAN LLOYD,
Claimant.

No. 1069. 642

CHARLES W. RANTOUL, Jr.,
Libelant,

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, etc.,
NORTH GERMAN LLOYD,
Claimant.

643

No. 1070.

MAURICE HANSSENS,
Libelant,

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, etc.,
NORTH GERMAN LLOYD,
Claimant.

644

No. 1075.

645

THE NATIONAL CITY BANK OF NEW YORK,
Libelant,

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," her engines, etc.,
NORTH GERMAN LLOYD,
646 Claimant.

No. 1076.

APPEARANCES:

Messrs. Convers & Kirlin (J. Parker Kirlin, Esq., and Charles R. Hickox, Esq.), of New York City, for Guaranty Trust Company of New York, for Charles W. Rantoul, Jr., and for Maurice Hanssens.

647 Messrs. Shearman & Sterling (Hon. James M. Beck and Carl A. Mead, Esq.) of New York City, for The National City Bank of New York.

Messrs. Blodgett, Jones, Burnham & Bingham (Edward E. Blodgett, Esq.), of Boston, Mass., for Libelants in all four cases.

Messrs. Choate, Larocque & Mitchell (Joseph Larocque, Esq.), of New York City, and Hon.
648 Walter C. Noyes and Hon. Joseph D. Bedle, of New York City, for Claimant in all four cases.

Boston, Massachusetts, March 31, 1915.
10 A. M.

THE COURT: Proceed.

Mr. Kirlin opened the case for the Guaranty Trust Company of New York.

Stipulation as to Facts.

Mr. Larocque opened the case for the Claimant. 649

Mr. Beck opened the case for the National City Bank of New York.

Mr. Hickox opened the case for Charles W. Rantoul, Jr., and Maurice Hanssens, Passengers.

It was stipulated between all the parties that the four cases should be tried together; that the 650
stipulations entered into in any of the cases and the testimony taken should be considered as part of the evidence in all the cases, so far as applicable; and that the answers to the interrogatories in any of the cases should stand as the answers in the other cases, so far as applicable.

The following stipulation was entered into between the Guaranty Trust Company and the claimant of the *Kronprinzessin Cecilie*: 651

1.

The libelant, Guaranty Trust Company of New York, is a corporation organized and existing under the laws of the State of New York, and having an office and principal place of business in the City of New York and a branch office in the City of London, England.

2. 652

The claimant, North German Lloyd, is a corporation organized under the laws of the Free and Hanseatic City of Bremen, and existing under said laws and the laws of the German Empire, and is and at all material times was the owner of the *Kronprinzessin Cecilie*.

3.

The steamer was built in the year 1907 at a cost of about $4,500,000.

653 *Stipulation as to Facts.*

4.

On July 27, 1914, the Guaranty Trust Company of New York shipped on board the *Kronprinzessin Cecilie* 93 kegs containing gold bars owned by said shipper of the value at the time and place of shipment of $4,942,937.64, to be carried by said steamship from the Port of New York to the Port
654 of Plymouth, England; thence to be forwarded at the steamer's expense, but at owner's risk, to London, unto Guaranty Trust Company of New York or its assigns, subject to the provisions and exceptions of a certain bill of lading covering the said shipment of gold, dated July 27, 1914, which was thereupon delivered to and accepted by the libelant as the contract of carriage covering the shipment in question. The copy of the bill of lading annexed to the claimant's answer to the
655 libel is a true copy of the said bill of lading.

5.

No statement written or oral was made by or on behalf of the libelant to the claimant or its agents of the purpose for which said shipment was made, otherwise than as stated in said bill of lading, or of the disposition which it intended to make of any of said gold, and no notice of any
656 special damages which would or might result from a failure on the part of said steamship or of the claimant to perform said contract. But under this stipulation the question of constructive notice is left open.

6.

The *Kronprinzessin Cecilie*, being then fully manned, outfitted and equipped, sailed on the aforesaid voyage from the Port of New York on

July 28, 1914, at about 1 o'clock A. M., and continued on said voyage until the night of July 31, 1914, at about 10:09 o'clock P. M., ship's time, when she turned back towards New York. At the time of turning back towards New York, the steamer was in the position of 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich, and distant about 1070 nautical miles from Plymouth. The position of the ship and her distance from destination at 10:09 o'clock P. M. July 31, 1914, is accepted by the libelant subject to correction at the trial.

7.

Before turning and at about 10 o'clock on the night last above mentioned there was received on board said steamship a wireless message from the Directors of the North German Lloyd at Bremerhaven in the North German Lloyd private code. The cipher message and its translation will be produced at the trial.

Upon receiving this message the Captain of said steamship opened a sealed envelope which he had in his possession and which contained the private code above referred to.

The wireless message above referred to was sent out by the managing directors of the North German Lloyd after the publication of the decree (Kriegsgefahr) threatened danger of war hereinafter set forth, and after having been informed of the intention of the Government to despatch on that day the notes to Russia and France referred to in Exhibits Numbers 24 and 25 of the German White Paper.

661 *Stipulation as to Facts.*

8.

At the time the steamer turned back on her voyage, as aforesaid, she was in a seaworthy condition, and in all respects outfitted and equipped sufficiently for the completion of the voyage. If the steamship had proceeded on her voyage, she

662 would in all reasonable probability have arrived in the Port of Plymouth in ordinary course, unless prevented by act of God, restraints of princes, fire or perils of the sea, or unfavorable wind or weather, at some time between 11 P. M. of August 2nd and 1 o'clock A. M. of August 3, 1914, and would have delivered the libelant's gold at Plymouth in care of the claimant's agents at that port for forwarding to London at about 6 o'clock A. M. of August 3, 1914; and, if the for-

663 warding of the gold to London had followed the usual course the gold would have been delivered to the order of Guaranty Trust Company of New York in London at some time late in the day of August 3, 1914. But, by stipulating these facts, the claimant does not admit that the steamer would ever have arrived at Plymouth or that the gold would ever have been delivered in London.

9.

664 After turning back on her course as aforesaid, the steamship proceeded in a westerly direction toward the United States, and put into Bar Harbor, Maine, on August 4, 1914, where she dropped anchor at about 4 o'clock A. M. By arrangement between the parties and the Navy Department of the United States the vessel was subsequently moved to the Harbor of Boston, where she now lies.

Stipulation as to Facts. 665

10.

On August 8, 1914, the claimant, in pursuance of a letter dated August 8, 1914, a true copy of which is annexed to the claimant's answer to the libel herein, redelivered to the libelant at Bar Harbor, Maine, the said 93 kegs of gold bars, being all the gold which the claimant had received from the libelant for carriage to England 666
as aforesaid.

11.

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the Guaranty Trust Company of New York the sum of $1,544.67, being the proportion of the prepaid freight covering the inland transportation of said Trust Company's gold from Plymouth to London, the acceptance of said refund by the Guar- 667
anty Trust Company of New York being without prejudice to its claim against said steamship and her owners for their alleged failure to deliver said shipment of gold in accordance with the terms of the contract.

12.

On the morning of July 31, 1914, Messrs. Oelrichs & Co., agents for North German Lloyd, re- 668
ceived a cable from the North German home office at Bremen instructing them to ascertain if the *Vaterland* would sail on the following day, to which Oelrichs & Co., on the same day, replied that the *Vaterland* and *Amerika* would not sail, and at the same time asked for instructions regarding the *Princess Irene*, scheduled to sail August 1 for the Mediterranean, the *Kronprinz Wilhelm* scheduled to sail August 4, and the

George Washington, scheduled to sail August 8, the latter two for Plymouth, Cherbourg and Bremen, and as to the possible recall of the *Grosser Kurfurst* which had sailed the day before, i. e. July 30.

On the afternoon of the same day, July 31, Oelrichs & Co. received cable instructions from the Nautical Department of the North German
670 Lloyd in Bremen not to allow any of the company's ships to sail from North America, and on the following day they received a cable instructing them to notify the *Grosser Kurfurst* and the *Friedrich der Grosse*, which had sailed from Baltimore on July 29 for Bremen. Oelrichs & Co. thereupon immediately notified by wireless the *Grosser Kurfurst* and *Friedrich der Grosse*, and also the *Neckar*, which had sailed from Gal-
671 veston on July 28 for Bremen. The *Grosser Kurfurst* and the *Friedrich der Grosse* both returned to New York, and the *Neckar* put into and remained at Havana.

12a.

On July 31, 1914, at 9:22 A. M., the Standard Oil Company of New Jersey received at its New York office a cable from its German subsidiary company, the Deutsche Amerikanische Petroleum
672 Gessellschaft, the following cable:

"Retain all vessels until further orders. Recall *Kiowa* and others."

The vessels referred to were under the German flag, and the Standard Oil Company of New Jersey immediately complied with said orders, and the *Kiowa* was recalled by wireless after she had passed Sandy Hook.

673

12b.

On July 30, 1914, the Hamburg-American Line in New York received from its home office in Hamburg a cable, dated July 30, reading:

"With the view of the present situation we are compelled to postpone departure *Vaterland* from New York. Please confirm receipt."

674

(S. S. *Vaterland* was advertised and ready to sail August 1.)

On July 31 the New York office received two cables from the Hamburg office, one marked 9:12 A. M., reading:

"Retain also *Amerika*, Boston, few days until political situation is clearer."

(S. S. *Amerika* was advertised and ready to sail August 1.)

675

The other, marked 10:37 A. M., was in German and, when translated, read:

"Order *President Grant* to return to New York."

(S. S. *President Grant* sailed from New York July 30.)

To this the New York office replied on July 31 in two messages. One read:

676

"*Vaterland, Amerika,* will not sail. Have telegraphed Meyerdiercks (Captain S. S. *President Grant*) situation for his guidance. Are holding *Rhaetia, Pisa, Armenia* for your instructions. Do you wish these vessels to proceed? All three advertised and ready to sail tomorrow. Please answer quickly."

677 *Stipulation as to Facts.*

The other message sent that day read:

> "*President Grant* has been ordered to return to New York."

On July 31 the New York office also received a cable reading:

> "Suppose that you are paying particular
678 attention to Atlas steamers, which are still running, as Jamaica must eventually be avoided."

To which it replied on August 1:

> "We are running our Atlas ships into neutral ports quickly as possible. Will give you details before close of the day. *Sibiria* left Rotterdam July 30. Have you
679 ordered her back."

On August 1, the New York office took upon itself to hold back further steamers that were to sail within a few days of that time, and sent the Company the following cable:

> "Only cables received were to hold back *Vaterland, Amerika* and to recall *Grant,* all of which was done. Your cables in each
680 case were acknowledged immediately. We had difficulty reaching Meyerdiercks. He has now acknowledged our messages to return. *Grant* will dock Brooklyn Sunday morning. We are retaining also *Pisa, Armenia, Joachim, Hamburg, Pennsylvania, Rhaetia, Bulgaria, Nassovia, Dacia, Georgia, Saxonia, Macedonia.* Will not allow other ships which will be arriving in next few days to load or depart without further instructions from you."

681

On August 1 the Company cabled the New York office two messages, both of the same purport. One read:

"Confirm at once receipt of our cable regarding detention all our steamers. Has *Grant* returned?"

The second read: 682

"Repeat our request of yesterday to confirm that you are retaining all our ships in North American ports and that *President Grant* has been ordered to return to New York. Cable immediately."

12c.

On July 31, 1914, there were in the harbor of New York consigned to the firm of Funch, 683
Edye & Co., the following German steamers, which were partly or nearly loaded:—*Armenia, Nassovia, Adamsturm, Harburg.* The *Armenia* and *Nassovia* stopped loading on July 31 at 11:30 A. M. in accordance with instructions received over the telephone from the Hamburg-American Line office in New York. The *Adamsturm* stopped loading at the same time in accordance with instructions received by cable dated July 30, 1914, from the Hansa 684
Steamship Company in Bremen. Messrs. Funch, Edye & Co. cabled to the owner of the *Harburg* that they would not permit her to sail until further instructions.

13.

Any party may offer at the trial newspaper reports or clippings as evidence of the publi-

cation on the dates mentioned, by the newspapers mentioned, and in the countries mentioned of the matters therein stated; subject to all objections except as to the competency of the mode of proof of such publications; and, if such newspapers were published in a foreign country or in a foreign language, translations
686 of such publications may be offered on the like terms subject to correction.

14.

The diplomatic correspondence, or parts thereof, of the various governments engaged in the present war, promulgated by the governments of Germany, England, France, Russia, Belgium and Austria, known as the German White Book, England's White Papers, the
687 French Yellow Book, the Russian Orange Paper, the Belgian Gray Paper, and the Austrian Red Paper, may be offered as evidence of the respective attitudes, contentions and positions of the various governments in relation to the matters therein referred to; subject to all objections except as to the competency of the mode of proof, and the party or parties making such offer shall not be required to pro-
688 duce authenticated copies thereof, but may use, subject to correction, copies thereof taken from the public press or other available source.

15.

Copies of proclamations, orders in council, or other orders of any government or department thereof engaged in the present war may be offered as evidence of the fact that the

respective governments on the dates stated in such proclamations made the official announcements therein contained, subject to all objections except as to the competency of the mode of proof.

It is agreed, that the following events occurred on the dates indicated:

16. 690

1914

June 23: Archduke Francis Ferdinand of Austria and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia.

17.

July 23: Austria sent an ultimatum to Servia, the terms of which appear in the German White Paper and the British White Paper. 691

18.

July 24: Russia urged that Austria abandon the time limit of her ultimatum "in order to prevent consequences equally incalculable and fatal to all the powers which might result from the course of action followed by the Austro-Hungarian Government." (British No. 13..) 692

19.

July 24: Russian Government informed other Powers that, if the Austro-Hungarian Government should make war on Servia, Russia could not allow the conflict to be settled between those two countries alone. (German, pp. 4, 6-37.)

20.

July 24: The French Ambassador at St. Petersburg gave the English Ambassador at St. Petersburg to understand "that France would fulfill all the obligations entailed by her alliance with Russia, if necessity arose, besides supporting Russia strongly in all diplomatic negotiations." (British No. 6.)

694

21.

July 24: German Government emphasized to other Powers its opinion that there is only question of a matter to be settled exclusively between Austria-Hungary and Servia, and that other Powers ought to reserve it to those two, because interference of another Power, owing to different treaty obligations, would be followed by incalculable consequences. (British No. 9.)

695

22.

July 25: Austria declined Russian request for extension of time limit in ultimatum to Servia. (Austrian Nos. 20, 21.)

696

23.

July 25: Servia replied to the Austrian ultimatum at 6 p. m. (Austrian No. 22). The terms of the reply are shown in the German and British White Papers.

24.

July 25: Austria advised Servia and the other powers that she considered Servia's reply unsatisfactory. The Austrian Minister left Belgrade at 6.30 p. m. The Servian Government moved from Belgrade to Nish this evening. (Austrian No. 21.) 698

25.

July 25: Germany confined her Alsace-Lorraine garrisons to barracks, and placed the frontier work of Alsace-Lorraine in a complete state of defence. (Viviani's Speech; French No. 159.)

26.

July 25: The populace in Berlin made demonstrations in favor of war. 699

27.

July 25: Servia ordered mobilization. (Austrian No. 22.)

28.

July 25: Russia began to take military precautions.

29.

July 25: Martial law was proclaimed in Austria. 700

30.

July 26: Austria severed diplomatic relations with Servia, and sent passports to the Servian Minister.

31.

July 26: Austrian mobilization against Servia was decreed. (Russian No. 30. Russian No. 24.)

701 *Stipulation as to Facts.*

32.

July 26: Austria advised Russia that she sought no territory of Servia, and did not intend to impair the sovereignty of that country, but that, aside from that, she was prepared to go to the "furthest extremes" to obtain satis-
702 faction of her demands. (Austrian No. 26).

33.

July 26: Austrian Ambassador at Washington instructed Consuls in the United States to tell reservists to prepare to return home for service.

34.

July 26: The Servian army began mobilization. There was a panic in Belgrade as
703 people fled from the city.

35.

July 26: American tourists left Carlsbad and other resorts.

36.

July 26: Belgium increased her army to enforce neutrality.

37.

July 26: The German fleet was concentrated in
704 the home waters.

38.

July 26: Germany indicated to her railroads the measures preparatory for concentration. (French No. 159.)

39.

July 26: Germany urged the other Powers not to interfere with Austro-Hungarian plans to discipline Servia.

705

40.

July 26: The German Ambassador at St. Petersburg was directed to make the following declaration to the Russian Government:

"Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France. We cannot assume that Russia desires to unchain such a European war. Since Austria-Hungary will not touch the existence of the Servian Kingdom, we are of the opinion that Russia can afford to assume an attitude of waiting. We can all the more support the desire of Russia to protect the intergrity of Servia, as Austro-Hungary does not intend to question the latter. It will be easy in the further development of the affair to find a basis for an understanding." (German, p. 7).

706

707

708

41.

July 26: The Russian Secretary of War gave the German military attache his word of honor that no order to mobilize had been issued, merely preparations were being made, but not a horse mustered, nor reserves called in. If Austria-Hungary crossed the

709 *Stipulation as to Facts.*

Servian frontier, such military districts as are directed toward Austria, namely Kiev, Odessa, Moscow, Kazan, would be mobilized; under no circumstances those on the German frontier, namely, St. Petersburg, Vilna, Warsaw. He added that peace
710 with Germany was desired very much. The military attache told the Secretary that Germany appreciated Russia's friendly intentions, but considered mobilization, even against Austria, as very menacing. (German, pp. 7, 8; Exhibit 11, p. 40; Austrian No. 28).

42.

711 July 26: Sir Edward Grey proposed to the Powers a conference in London between himself and the Ambassadors of Germany, France and Italy for the purpose of discovering an issue that would prevent complications. If agreed to, the representatives of these Powers were to request author-
712 ities at Belgrade, Vienna and St. Petersburg to suspend active military operations pending results of conference. (English No. 36).

43.

July 26: Russia asked Austria to take back her ultimatum and modify its form; and, if this were done, offered to guarantee the result. (French No. 54; Russian No. 25).

44.

July 26: Russia informed Italy that the Austrian-Servian conflict could not be localized (Russian No. 23).

45.

July 26: Austria notified the Powers that the refusal of Servia to accept the Austrian demands in full without reservations would compel Austria to force Servia by the most drastic measures to a complete submission. (Austrian No. 30; British No. 48; French No. 75). 714

46.

July 26: Russia announced that she could not be asked to allow Servia to be crushed. (French No. 52). 715

47.

July 26: The German fleet in Norway put to sea. (French No. 58).

48.

July 27: Germany completed requisitions, and placed her covering troops in position in Alsace-Lorraine. (French No. 159).

49.

July 26: Austria ordered partial military and naval mobilization. (Cf. British Nos. 71, 78; German Exhibit 23). 716

50.

July 27: Russia notified Austria that, if war broke out between Austria and Servia, Russia would not give way. (British No. 56).

51.

July 27: Vienna and Budapest bourses closed.

52.

July 27: A skirmish occurred on the Danube between Austrian and Servian forces. (British No. 56; Cf. British No. 93, subdiv. 2).

53.

July 27: England stated to Germany that, if Austria, notwithstanding the terms of the Servian reply, should invade Servia, she would prove she wished to crush a small state. This would raise a European question, and a war would ensue in which all the Powers would take part. (French No. 66; Russian No. 42).

54.

July 27: France, Italy and Russia agreed to Sir Edward Grey's proposal of the 26th for a conference of ambassadors in London. (French Nos. 70, 71, 72; Russian Nos. 31, 32).

55.

July 27: State of war declared in Russian province of Kovno. (German Annex No. 8).

56.

July 27: Belgian army was mobilized.

57.

July 27: Shots were fired by a Cossack patrol on a German patrol at the Russian frontier.

58.

July 27: The 14th Corps of the French army discontinued manoeuvres, and returned to its garrison. Information to this effect was received in Berlin. (German, p. 8, Annex 9).

59.

July 27: Germany refused Sir Edward Grey's proposal for a conference of ambassadors at London. (French No. 74; Russian No. 34; Austrian Nos. 35, 38, 40; British No. 71).

60.

July 27: The Czar informed the Crown Prince of Servia, if all efforts for peace failed, Russia would not disinterest herself in the fate of Servia. (Russian No. 40; French No. 99). 722

61.

July 27: Russia proposed to Austria that desired modifications in latter's demands on Servia be the subject of direct conversations between St. Petersburg and Vienna. (British No. 45). 723

62.

July 28: Austria declined this proposal. (Russian No. 45; British Nos. 74, 93; French No. 82).

63.

July 28: Austria also refused Sir Edward Grey's proposal. (Russian No. 45; British Nos. 61, 62; German Annex 16). 724

64.

July 28: Austria declared war on Servia by delivery of the note marked No. 37 in Austrian Paper (cf. British No. 50).

65.

July 28: Servian vessels were seized in the Danube. (London Times, August 3, 1914; British No. 65).

725 *Stipulation as to Facts.*

66.

July 28: State of siege declared in Slavonia, Croatia and Fiume. Austrian reservists of all classes mobilized in those districts. (Russian No. 44).

67.

July 28: Germany began to summon individual reservists, including those distant
726 from the frontier. (British No. 105 (3).)

68.

July 28: Austrian decree for general mobilization signed. (Russian No. 47.)

69.

July 29: Russia informed Austria that a ukase would be issued ordering a somewhat extended mobilization as a precautionary measure only; that
727 the troops were not destined to attack Austria; but would be held armed and ready in case Russian interests in the Balkans should be imperiled; Russian Minister spoke of the harmlessness of this measure. (Austrian No. 47.)

70.

July 29: Sir Edward Grey informed the Ger-
728 man Ambassador that, if Germany and France became involved and the issue became such that British interest required his government to intervene, it might not be able to stand aside. (British No. 89.) The German Ambassador said emphatically that some means must be found for preserving the peace of Europe. (British No. 90.)

729

71.

July 29: Austria commenced bombardment of Belgrade. The major part of the Austrian army was mobilized. (British No. 93 (2).)

72.

July 29: England requested Germany to suggest any form of procedure under 730
which the idea of mediation between Austria and Russia, already accepted by the German Government in principle, could be applied. (British No. 92; French No. 98.)

73.

July 29: France notified Germany that she was sincerely desirous of peace, but
that she was determined at the 731
same time to act in full harmony with her allies and friends. (Russian No. 55.)

74.

July 29: Germany communicated to Russia her intention to mobilize if Russia did not cease her military preparations. (Russian No. 58.)

75. 732

July 29: Russia ordered mobilization in the military conscriptions of Odessa, Kiev, Moscow and Kazan. Russian Government notified the German Government that these military districts have been mobilized along the Austrian and Hungarian frontier exclusively, and stated that this should not be

taken as an aggressive measure, even against Austria (British No. 93), the explanation being the mobilization of the greater part of the Austro-Hungarian Army. Russia also informed Germany that the military measures taken
734 by Russia were not directed against Germany. (British Nos. 93 (2), 70, 76, 78, 88, 94; Russian Nos. 49, 51.)

76.

July 29: Germany and France recalled officers on leave and made preparations for mobilization. (British Nos. 98, 99; French Nos. 88, 89.)

77.

735 July 29: The Czar telegraphed to the Kaiser, saying: "It would be right to "give over the Austro-Servian "problem to the Hague Conference." (New York *Times*, February 1, 1915.)

78.

July 30: British first fleet left Portland.

79.

736 July 30: The Netherlands declared its neutrality.

80.

Sir M. de Bunsen reported to Sir Edward Grey that the French Ambassador had heard from Berlin that the German Ambassador at Vienna was instructed to speak seriously to the Austro-Hungarian Government against acting in a manner

737

calculated to provoke a European war; he added "unfortunately the German Ambassador is himself so identified with extreme Anti-Russian and Anti-Servian feeling prevalent in Vienna that he is unlikely to plead the cause of peace with entire sincerity. Although I am not able 738 to verify it I have private information that the German Ambassador knew the text of the Austrian ultimatum to Servia before it was dispatched and telegraphed it to the German Emperor. I know from the German Ambassador himself that he indorses every line of it" (British No. 95.)

739

81.

July 30: Russia notified Germany that she would demobilize if Austria would give an assurance that she will respect the sovereignty of Servia, and submit certain of the demands of the Austrian note, which Servia has not accepted, to an international discussion. President Poincare stated that he thought these conditions 740 would not be accepted by Austria. (British No. 99.)

82.

July 30: Russia made to the German Ambassador the following proposal:

"If Austria, recognizing that her dispute with Servia has assumed the character of a question of European interest, declares herself ready to

eliminate from her ultimatum the clauses which affect the sovereignty of Servia, Russia will undertake to stop all military measures."

The German Ambassador promised to urge this proposal on his Government. (French No. 103.)

83.

742 July 30: Austrian Secretary of State for Foreign Affairs informed Russian Ambassador at Vienna that, with a view to settling the Austro-Servian dispute, it was agreed that pourparlers should be resumed at St. Petersburg, the Austrian Ambassador being authorized to discuss what settlement would be compatible with the
743 dignity and prestige for which both empires had equal concern. (French No. 104.)

84.

July 31: London stock exchange closed. Canadian bourses closed.

85.

July 31: Germany broke communication with France by roads, railways, telegraph and telephone; seized French locomotives upon arrival at the frontier;
744 placed machine guns in the permanent way which had been cut, and concentrated troops on the French frontier. (Viviani's Speech, French No. 159.)

86.

July 31: France learned that Germany had summoned six classes of reservists,

745

which would bring their covering troops up to war strength, and was equivalent to mobilization. (British No. 136.) She also learned that transport was being collected even for the army corps stationed a considerable distance from the frontier. (British Nos. 136, 137.)

746

87.

July 31: The German squadron stopped vessels off Helgoland, and inquired their nationality, destination and cargo.

88.

July 31: Holland and Switzerland ordered partial mobilization of their arms to protect their frontiers and maintain neutrality.

747

89.

July 31: Austria-Hungary announced at St. Petersburg her willingness to discuss with Russia her differences with Servia. (French Nos. 120, 121; British Nos. 110, 133.)

90.

July 31: Austrian Government communicated to French Government her willingness to discuss even the basis of the Austro-Servian question at London with the other Powers. (French No. 125; British Nos. 110, 133.)

748

91.

July 31: The German Emperor issued a decree declaring a state of threatening war (Kriegsgefahr), and so informed Russia, adding that "this does not yet imply mobilization", and

749 continuing, "mobilization, however, is bound to follow if Russia does not stop every measure of war against us, and against Austria-Hungary within 12 hours and notify us to this effect." (German Exhibit 24.) This message was delivered at midnight.

750 (Russian No. 70.)

92.

July 31: Russia offered to the Powers the following agreement:

"If Austria will agree to check the advance of her troops on Servian territory; if, recognizing that the dispute between Austria and Servia has become a question of European interest, she will allow the Great Powers

751 to look into the matter and decide what satisfaction Servia could afford to the Austro-Hungarian Government without impairing her rights as a sovereign state or her independence, Russia will undertake to maintain her waiting attitude." (Russian No. 67.)

93.

752 July 31: The Czar telegraphed to the German Emperor assuring him that no intention whatever of aggressive character was conceived behind Russian military preparations, and that so long as conversation with Austria continued the Czar undertook that not a single man should be moved across the frontier. (British No. 120.)

753

94.

July 31: Belgium ordered general mobilization of her army.

95.

July 31: German Emperor issued a proclamation declaring a state of war (kriegsustand) as follows:

"We, William, by the Grace of God, German Emperor, King of Prussia, etc., decree by virtue of Art. 68 of the Constitution of the German Empire, in the name of the Empire, the following the Imperial territory, with the exception of the Royal Bavarian Territory, is hereby declared to be in a state of war. This decree goes into effect with its publication."

754

755

The foregoing decree had the effect of putting Germany on a war footing but did not amount to a declaration of war against or actual hostilities with any other nation.

97.

July 31: General Austrian mobilization is decreed. (French No. 115; British Nos. 126, 134.)

756

98.

July 31: Russia orders general mobilization. (British No. 113.) The British Ambassador at St. Petersburg telegraphed Sir Edward Grey as follows:

"St. Petersburg, July 31, 1914.

It has been decided to issue orders for general mobilization.

757 *Stipulation as to Facts.*

This decision was taken in consequence of report received from Russian Ambassador in Vienna to the effect that Austria is determined not to yield to intervention of Powers, and that she is moving troops against Russia as well as against Servia.

758 Russia has also reason to believe that Germany is making active military preparations, and she cannot afford to let her get a start."

99.

July 31: The German steamers *Pawnee, Newissa, Titania* cleared at the Custom House in London for Hamburg, and German steamer *Moure* cleared at the same custom house for Bremen.

759 (Certificate of British Customs.)

100.

July 31: Notwithstanding mobilization, the Emperor of Russia expressed himself ready to continue his conversation with the German Ambassador with a view to preserving the peace. (British No. 134.) French Government stated that their wishes were markedly pacific, sincerely desired

760 the preservation of peace, and did not quite despair even now of its being possible to avoid war. (British No. 134.)

101.

"The Czar to the German Emperor:

Peterhof, July 30, 1914, 1:20 P. M.

I thank you from my heart for your prompt answer. I am sending Tatisheff this evening with instruc-

tions. The military measures now being taken were decided upon five days ago for defensive purposes against Austria's preparations. I hope with all my heart that these measures will not influence in any way your position as a mediator, which I highly esteem. We need 762 your strong pressure on Austria in order that an understanding may be brought about with us.

NICHOLAS."

(German No. 23a.)

102.

July 31: France declared that, in case of war, she would respect the neutrality of Belgium. (British No. 125.)

103. 763

July 31: In reply to British inquiry as to whether Germany would engage to respect the neutrality of Belgium so long as no other power violated it, the German Secretary of State replied that he must consult the Emperor and Chancellor before he could possibly answer, and implied that he was very doubtful as to whether a reply would be given, as any reply 764 could not but disclose a certain amount of their plan of campaign in the event of war ensuing. (British Nos. 114, 122.)

104.

July 31: German steamer *Kronprinzessin Victoria* sailed from Shields for Rio de Janeiro. (London Times, August 1, 1914.)

105.

July 31: German Ambassador at Paris was instructed to demand from the French Government a declaration within eighteen hours whether it would remain neutral in a Russo-German war.

106.

766 July 31: At 7 P. M., the German Ambassador asked the French Premier what the attitude of France would be in case of war between Germany and Russia. The reply was that France would have regard to her interests. (French No. 117.)

107.

July 31: After the Russian general mobilization
767 became known, the German Ambassador at St. Petersburg was on the afternoon of July 31st instructed to explain to the Russian government that Germany had proclaimed a threatening state of war as a counter-measure against the general mobilization of the Russian army and navy and that this must be fol-
768 lowed by a German mobilization if Russia did not stop every measure of war against Germany and Austro-Hungary within twelve hours and notify Germany thereof. (German No. 24.)

108.

July 31: New York Stock Exchange and Coffee and Cotton Exchanges closed (N. Y. Herald, August 1st, p. 1).

109.

July 31: At midnight, the German Ambassador announced to Russian Foreign Secretary that, if within twelve hours we had not begun to demobilize, not only against Germany but also against Austria, the German Government would be compelled to give the order for mobilization. The Ambassador stated that this did not mean war but added "we were very near it." (Russian No. 70.) 770

110.

Aug. 1: German steamer *Reichenbach* sailed from Liverpool for Gothenburg. (Times, August 3.)

111.

Aug. 1: German steamers *Norstr* and *Uranus* cleared at the London Custom House for Hamburg. German steamer *Emma Minlos* cleared at same custom house for Genoa. German steamers *Breslau* and *Borussia* cleared from the same custom house for Stettin and Cologne respectively. (*Certificate of British Customs.*) 771

112.

Aug. 1: German steamer *Prinz Regent* cleared from the Custom House at Southampton and sailed for Durban. (Times, August 3.) 772

113.

Aug. 1: German Government orders general mobilization, first day of mobilization to be 2nd August. (British No. 142; French Appendix II, No. 3; French Nos. 127, 131.)

773 *Stipulation as to Facts.*

114.

Aug. 1: German Government instructed its Ambassador at St. Petersburg that, if the Russian Government should not give satisfactory reply to the demand of the 30th for demobilization of the Russian military forces, the
774 Ambassador should deliver at 5 o'clock p. m. a declaration of war in a prescribed form. (Exhibit 26.)

115.

Aug. 1: The German Chancellor advised the German Ambassador in London that, in view of the mobilization, concentration of German troops on the French frontier could not be modified, adding, "We guarantee, however,
775 that between now and Monday, August 3, at 7 p. m., the French frontier shall not be crossed if England's acceptance (of a German proposal relative to the neutrality of France) has reached us by that time." (French Appendix II, No. 3; German Annex 27.)

116.

776 Aug. 1: Belgium declared her neutrality and her expectation that other Powers will observe it. (British No. 128.)

117.

Aug. 1: The French Government informs British Government that they will respect Belgian neutrality. (French No. 122; Belgian Nos. 13, 15.) German Government refused to give similar engagement. (French No. 123.)

118.

Aug. 1: German Ambassador at Paris informed of Austria's offer at St. Petersburg proclaimed his peaceful intentions, and suggested that there was a glimmer of hope of a peaceful solution. He did not make any fresh request for an answer to his question concerning the attitude of France in case of an Austro-Russian conflict. (French No. 125.) 778

119.

Aug. 1: Austria orders mobilization of her army and fleet. (British No. 127.)

120.

Aug. 1: Germany detained steamers of Great Central Company and others in Hamburg. England requested that orders be given that they be allowed to proceed without delay. (British No. 130.) German Secretary of State expressed the greatest surprise and annoyance, and promised to send orders at once to allow steamers to proceed without delay. (British No. 143.) 779

121. 780

Aug. 1: French troops have orders not to go nearer than 10 kilometers from the German frontier. (British Nos. 134, 136.)

122.

Aug. 1: France gives orders for general mobilization of French army for purely defensive purposes. French troops will not attack, and zone of

781 10 kilometers is left between the French troops and the frontier. (British Nos. 136, 140; French No. 127.)

123.

Aug. 1: Sir Edward Grey informed German Ambassador that, if Germany
782 would give some assurance, as had been given by France, about neutrality of Belgium, the fact would materially contribute to relieve anxiety and tension. German Ambassador asked Sir Edward Grey to formulate conditions on which England would remain neutral. Latter said England must keep her hands free. (British No. 123.)

783

124.

Aug. 1: Russia informed all the Powers as follows: "If Austria consents to stay the march of her troops on Servia's territory and if, recognizing that the Austro-Servian conflict has assumed the character of a question of European interest, she admits that the great Powers
784 may examine the satisfaction which Servia can accord to the Austro-Hungarian Government without injury to her sovereign rights as a state and to her independence, Russia undertakes to preserve her waiting attitude." (British No. 132.)

125.

Aug. 1: Austrian Ambassador in London informed Sir Edward Grey that Austria had not banged the door on further conversations with St. Petersburg.

126.

Aug. 1: Russian Foreign Minister announced that, notwithstanding action of Germany and Austria, Russia would not in any case begin hostilities first. (British No. 139.) 786

127.

Aug. 1: German Emperor telegraphed to the King of England that, on technical grounds, German mobilization must proceed against two fronts, east and west, as prepared, because the telegram from the King of England came late. He also said: "But if France offers me "neutrality, which must be guaran- "teed by the British fleet and "army, I shall of course refrain "from attacking France and em- "ploy my troops elsewhere. I "hope that France will not become "nervous. The troops on my fron- "tier are in the act of being "stopped by telegraph and tele- "phone from crossing into "France." (German Annex 27.) 787 788

128.

Aug. 1: The German Ambassador informed the Italian Secretary of State of the demands which Germany had made on Russia and France on

July 31, and asked what were the intentions of the Italian Government. The Secretary replied that, as the war undertaken by Austria was, in his opinion, aggressive, and did not fall within the purely defensive character of the Triple Alliance, particularly in view of the consequences which might result from it, according to the declaration of the German Ambassador, Italy would not be able to take part in the war. (French No. 124.)

789

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129.

Aug. 1: Russian Ambassador at London was informed by Sir Edward Grey that he had telegraphed to Berlin that the last formula accepted by the Russian Government offered best prospect as basis of negotiation for possible settlement. He hoped that no great Power would open hostilities before this formula had been considered. (Russian No. 71.)

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130.

792 Aug. 1: German Ambassador at Paris was informed by French Premier that latter's signature to order of mobilization in reply to that of Germany did not necessarily entail war, and that the German Ambassador might stay in Paris, as the Russian Ambassador had remained in Vienna, and the Austrian Ambassador in St. Petersburg. (Russian No. 74.)

793

131.

Aug. 1: Germany declared war on Russia by delivering to the Russian Foreign Minister at St. Petersburg, at 7:10 P. M., the following notice: "The Imperial German Govern-
"ment have used every effort
"since the beginning of the crisis
"to bring about a peaceful settle-
"ment. In compliance with a wish
"expressed to him by His Majesty
"the Emperor of Russia, the Ger-
"man Emperor had undertaken, in
"concert with Great Britain, the
"part of mediator between the
"Cabinets of Vienna and St.
"Petersburg; but Russia, without
"waiting for any result, proceeded
"to a general mobilization of her
"forces both on land and sea. In
"consequence of this threatening
"step, which was not justified by
"any military proceedings on the
"part of Germany, the German
"Empire was faced by a grave and
"imminent danger. If the Ger-
"man Government had failed to
"guard against this peril, they
"would have compromised the
"safety and the very existence of
"Germany. The German Govern-
"ment were, therefore, obliged to
"make representations to the Gov-
"ernment of His Majesty the Em-
"peror of All the Russias and to

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797 "insist upon a cessation of the "aforesaid military acts. Russia "having refused to comply with "[not having considered it neces- "sary to answer*] this demand, and "having shown by this refusal "[this attitude*] that her action 789 "was directed against Germany, I "have the honour, on the instruc- "tions of my Government, to in- "form your Excellency as fol- "lows:

"His Majesty, the Emperor, my "august Sovereign, in the name of "the German Empire, accepts the "challenge, and considers himself "at war with Russia." (Russian 799 No. 76.)

Aug. 1: German Ambassador after delivering the declaration of war, at 7:30 P. M. and in company with his entire staff left St. Petersburg. On receipt of this news at Paris the council of ministers was hurriedly called to meet President Poincare at the Elysee Palace.

132.

800 Aug. 1: Hamburg-American steamer *Schwarzwald* signalled 190 miles S.W. of Lands End, July 31, 1:57 p. m., from Port Limon. (London Times, Aug. 1, 1914).

"* The words in brackets occur in the original. It must be supposed that two variations had been prepared in advance, and that, by mistake, they were both inserted in the note."

133.

Aug. 1: Hamburg South American Line steamer *Rio Pardo* signalled 200 miles S. of Lands End, July 31, 12:45 a.m., for Hamburg. (London Times, August 1, 1914).

134.

Aug. 1: German East African steamer *Swaopmund* passed Beachy Head from Luderitz Bay. (London Times, August 3, 1914). 802

135.

Aug. 1: Hamburg-American Line *Cheruskia* passed Gibraltar from Basra. (London Times, August 3, 1914).

136.

Aug. 1: Hamburg-American steamer *Schwartzwald* passed the Lizard for Havre and Hamburg. (London Times, August 3, 1914). 803

137.

Aug. 1: Hamburg-American Line steamer *Wurtemberg* passed Gibraltar for Hamburg. (London Times, August 3, 1914).

138.

Aug. 1: Hamburg-American Line steamer *Rio Pardo* passed Dover for Hamburg. (London Times, August 3, 1914). 804

139.

Aug. 1: North German Lloyd Line steamer *Main* passed Dover July 31st for Baltimore. (London Times, August 3, 1914).

805 *Stipulation as to Facts.*

140.

Aug. 1: North German Lloyd Line steamer *Willihad* left Quebec for Rotterdam, and put into Boston, where she has since remained.

141.

Aug. 1: German steamer *Breslau* sailed from
806 Gravesend for Stettin.

142.

Aug. 2: British Wilson Line *Castro* bound from Danzig to Hull with coal, was seized in the Kiel Canal and ordered to Hamburg. (London Times, August 3, 1914).

143.

Aug. 2: British steamer *Saxon* bound from King's Lynn with a cargo of coal
807 from Brunsbuttel on the Kiel Canal was seized by the German Naval authorities and taken into Cuxhaven. (London Times, August 3, 1914).

144.

The following report appeared in the New York Times of Monday, August 3, page 2:

808 "BRITISH SHIPS SEIZED

"A Wilson Liner at Kiel and a Collier Captured by Germany.

"London, Aug. 2.—The German High Sea Fleet came out of the Baltic through the Kiel Canal today..... The Wilson liner *Castro* was seized in the canal.

"Another vessel, the *Saxon,* a British collier was seized with her cargo at Brunsbuttel and taken to Cuxhaven. The *Saxon* sailed from King's Lynn, near Norfolk, England, last Thursday. Her destination was Brunsbuttel, near the mouth of the Elbe.

"All sailings to German and Russian (Baltic) ports have been cancelled." 810

146.

Aug. 2: German Secretary of State informed the British Ambassador that orders had been given to allow British ships in Hamburg to sail; that the reasons for their detention were that mines were being laid and other precautions taken. (British No. 145). 811

147.

Aug. 2: Hamburg-American Line steamer *Almiria* passed Beachy Head from Momaguo. (London Times, August 3, 1914).

148.

Aug. 2: Hamburg-American Line steamer *Schwarzwald* passed Dover from St. Thomas for Hamburg. (London Times, August 4). 812

149.

Aug. 2: German steamer *Emma Minlos* sailed from Gravesend for Genoa. (London Times, August 3, 1914).

813 *Stipulation as to Facts.*

150.

Aug. 2: German army marches into Luxembourg. German Chancellor informed Minister of State of Luxembourg that action of Germany did not constitute hostile act against Luxembourg. (French No. 132). Similar notification was given by German Ambassador in Paris to French Foreign Minister. (French No. 133).

814

151.

Aug. 2: German troops crossed the French frontier near Longwy, Ciry and Belfort, where they fired on French troops which had been moved back 11 kilometres from the border. Skirmishes occurred at this point between reconnoitering parties. (London Times, August 3, 1914; French No. 136).

815

152.

Aug. 2: France regarded these acts as attempts to force her into war. (London Times, August 3; French No. 136).

153.

Aug. 2: French Government handed to the German Ambassador in Paris following note with reference to these events, telegraphed copy of it to the French Ambassador at Berlin with instructions to protest in the same terms to the German Government as follows: "The French administrative "and military authorities in the east- "ern district have just reported "several acts which I have instructed

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"the Ambassador of the Republic at
"Berlin to bring to the knowledge
"of the Imperial Government. The
"first has taken place at Delle in the
"district of Belfort; on two occa-
"sions the French Customs station
"in this locality has been fired upon
"by a detachment of German sol- 818
"diers. North of Delle two German
"patrols of the 5th mounted Jaegers
"crossed the frontier this morning
"and advanced to the villages of
"Joncherey and Baron, more than
"ten kilometres from the frontier.
"The officer who commanded the
"first has blown out the brains of a
"French soldier. The German cav-
"alry carried off some horses which 819
"the French mayor of Suarce was
"collecting and forced the inhabi-
"tants of the commune to lead the
"said horses. The Ambassador of
"the Republic at Berlin has been in-
"structed to make a formal protest
"to the Imperial Government against
"acts which form a flagrant viola-
"tion of the frontier by German 820
"troops in arms, and which are not
"justified by anything in the present
"situation. The Government of the
"Republic can only leave to the Im-
"perial Goverment the entire re-
"sponsibility for these acts."

(French No. 139).

The protest was delivered by the French Ambassador to the German

821 *Stipulation as to Facts.*

Secretary of State on August 3, who replied as follows: "Herr von "Jagow explained to me that he had "no knowledge of the facts of which "I was speaking to him, and he "added that it was difficult for events "of this kind not to take place when
822 "two armies, filled with the feelings "which animated our troops, found "themselves face to face on each "side of the frontier." (French No. 155).

154.

Aug. 2: British Royal Fleet reserve and Royal Naval reserve were called out. (London Times, August 3, 1914, p. 4). Those in New York were ordered to
823 report to the British Consulate.

155.

Aug. 2: British Naval Reservists in the United States were ordered to report to the British Consulate in New York.

156.

Aug. 2: 7 P. M. Germany presented a demand to Belgium that the German troops be permitted to pass through Belgium,
824 adding that, if this leave should be refused, Germany would be compelled to consider Belgium as an enemy. (Belgian No. 20).

157.

Aug. 2. The British Foreign Secretary telegraphed to the British Ambassador at Berlin that he is informed that cargoes of sugar were being unladen

in Hamburg from English vessels, requesting Ambassador to inform Secretary of State that the British Government trusts that the orders issued and sent to Hamburg to allow the British ships to depart cover also the release of their cargoes, the detention of which he stated cannot be justified. (British No. 149.) 826

158.

Aug. 2: Sir Edward Grey announced that, if German fleet came into the Channel or through the North Sea, the British fleet would give all protection in its power, as the French fleet had long been concentrated in the Mediterranean. (British No. 148; French No. 137.) 827

159.

Aug. 2: Belgium Foreign Minister advised German Minister at Brussels that what Belgian Government knew of Germany's intentions from numerous previous conversations did not allow any doubt of their perfect correctness toward Belgium but Belgium would be glad to have formal declaration of Germany accordingly. (Belgian, No. 19.) 828

160.

Aug. 3: 3 A. M. Hamburg-American Line steamer *Bohemia* was signalled two miles S.W. from Brow Head bound for Hamburg.

161.

Aug. 3: 7 A. M. Belgium declined the demands of Germany for leave for the troops to pass through Belgium. (Belgian No. 22.)

162.

Aug. 3. During the morning, the German Foreign Secretary informed the French
830 Ambassador "The Government has not yet come to a decision. It is probable that Herr Von Schoen will receive orders today to ask for his passports and then you will receive yours." (French No. 155.)

163.

Aug. 3: Noon. Belgian Foreign Minister announced that, although German ultimatum had expired at 7 a. m., as no
831 act of war had occurred up to the present, the Cabinet decided there was, for the moment, no need to appeal to the guaranteeing Powers. (Belgian No. 24.)

164.

Aug. 3: The British Ambassador at Berlin telegraphed Sir Edward Grey as follows: "Your telegram of 2d August
832 (No. 149). Detention of British ships at Hamburg. No information available."

165.

Aug. 3: Russians cross the German frontier and seize a railroad station.

166.

Aug. 3: Martial law is proclaimed throughout France and Algiers.

167.

Aug. 3: Germany invaded Russian Poland and seized three cities.

168.

Aug. 3: The German Embassy at London issued the following explanation of the recent interference of British ships by German war vessels.

834 "This action was merely a police measure and there was no intention on the part of Germany to interfere with the property of the vessels. The *Castro* was ordered to Hamburg because it was undesirable that any commercial vessel be in the Kiel Canal, while in the case of the *Saxon* the German government had purchased the coal long before from the 835 firm to which it was consigned and had ordered the detention of the vessel at Hamburg." (N. Y. Times, August 4.)

This is admitted by claimant, subject to correction, merely as a copy of a declaration emanating from the German Embassy and not as an admission of the facts. It is admitted that the two vessels in question are 836 still detained at Hamburg.

169.

Aug. 3: At 6 p. m., the French Ambassador at Berlin was handed his passports.

170.

Aug. 3: At 6:45 p. m., the German Ambassador at Paris delivered to the French Minister for Foreign Affairs the following note:

837 *Stipulation as to Facts.*

"M. le President, The German administrative and military authorities have established a certain number of flagrantly hostile acts committed on German territory by French military aviators. Several of these have openly violated the neutrality of
838 Belgium by flying over the territory of that country; one has attempted to destroy buildings near Wesel; others have been seen in the district of the Eifel, one has thrown bombs on the railway near Carlsruhe and Nuremberg. I am instructed, and I have the honour to inform your Excellency, that in the presence of these acts of aggression the German Em-
839 pire considers itself in a state of war with France in consequence of the acts of this latter Power. At the same time I have the honour to bring to the knowledge of your Excellency that the German authorities will detain French mercantile vessels in German ports, but they will release them if, within forty-eight hours, they are assured of complete reci-
840 procity. My diplomatic mission having thus come to an end it only remains for me to request your Excellency to be good enough to furnish me with my passports, and to take the steps you consider suitable to assure my return to Germany, with the staff of the Embassy, as well as with the staff of the Bavarian Le-

gation and of the German Consulate General in Paris. Be good enough, M. le President, to receive the assurances of my deepest respect."

The French Minister for Foreign Affairs challenged the accuracy of the allegations of the German Ambassador. (French Nos. 147, 148.) 842

171.

Aug. 3: King of the Belgians appealed to King of Great Britain for diplomatic intervention of the British Government to safeguard the neutrality of Belgium. (Belgian No. 25; British No. 153.)

172.

Aug. 3: The French Premier sent the following note to the French Ambassador 843 at Berlin:

"I request you to ask for your passports and to leave Berlin at once with the staff of the Embassy, leaving the charge of French interests and the care of the archives to the Spanish Ambassador. I request you at the same time to protest in writing against the violation of the neutrality of Luxemburg by German 844 troops of which notice has been given by the Prime Minister of Luxemburg; against the ultimatum addressed to the Belgian Government by the German Minister at Brussels to force upon them the violation of Belgian neutrality and to require of that country that she

should facilitate military operations against France on Belgian territory; finally against the false allegation of an alleged projected invasion of these two countries by French armies, by which he has attempted to justify the state of war which he declared henceforth exists between Germany and France." (French No. 149.)

173.

Berlin, Aug. 3. An official communication published here today concerning the beginning of the war, says:

"In consequence of a Russian attack on German territory, Germany is in a state of war with Russia.

"The French reply to Germany's note has been received in the meantime, and is of an unsatisfactory character. In addition, France has ordered the mobilization of her army, so that the outbreak of war between Germany and France must be awaited any moment."

This communication was published in the New York Evening Post, final edition, of Monday, August 3, 1914, p. 1, column 4, and is subject to correction.

174.

Aug. 3: The Hamburg-American Line Steamer *Kronprinzessin Cecilie*, bound from New York for Hamburg, passed through the Channel bound east and when off Plymouth she sighted

searchlights which were taken to be the lights of warships. She turned around about 11 o'clock P. M., the officers stating that she was intending to make for a Spanish port. She anchored in the port of Falmouth, England, early in the morning of August 4. During that day several war vessels, not bearing distinctive marks of nationality anchored off Falmouth.

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174-a.

Lloyd's Official List of Prizes of War and vessels and cargoes detained in United Kingdom ports on the outbreak of war dated January 25, 1915, contains the following note:

851

"*Kronprinzessin Cecilie*, German steamer, 8,684 tons from New York for Hamburg seized at Falmouth August 4th. Since arrived London, August 25th."

The accuracy of this statement being questioned libelant's proctors cabled to William A. Crump & Sons, solicitors, London, March 25, 1915, as follows:

852

"Lloyd's Official List of Prizes of War, dated 25th January, states Hamburg-American Steamer *Kronprinzessin Cecilie* seized Falmouth August 4th. Our information is seizure occurred 5th. Kindly investigate and cable early as possible the day and hour of actual seizure."

On March 26th, 1915, William A.

853 *Stipulation as to Facts.*

Crump & Sons cabled the libelant's proctors in reply as follows:

"*Kronprinzessin Cecilie* seized 6 o'clock morning 5th August."

The source of this information was not stated.

Libelant's proctors on March 30 cabled to Messrs. William A. Crump
854 & Son, asking them to state the source of the information contained in their telegram of March 26, and on March 31 Messrs. Crump & Son replied as follows: "*Kronprinzessin* Information obtained from Collector of Customs who seized steamer Mailed last night copy affidavit by Collector, filed Prize Court, stating seizure on fifth." The copy of said
855 affidavit subsequently received, states: "The above mentioned ship was seized as prize by me to the use of his Majesty in the said port on the fifth day of August, 1914."

175.

Aug. 4: 4 A. M. the German Cruiser *Breslau* bombarded the French Naval steamer at Bauma, Algeria. The
856 German forces began to shell the fortress Liege in Belgium. French war ships sank the German cruiser *Panther* in the Mediterranean.

176.

Aug. 4: British Minister to Belgium informed British Foreign Secretary that German troops have entered Belgian territory and that Liege had been summoned to surrender. (British No. 158).

Stipulation as to Facts. 857

177.

Aug. 4: Great Britain protested to Germany against violation of Belgian neutrality, and requested assurance that demand made on Belgium would not be proceeded with and that her neutrality would be respected by Germany. (British No. 153). 858

178.

Aug. 4: British Foreign Minister telegraphed British Ambassador at Berlin to protest against detention of British ships, at Hamburg, Cuxhaven and other German ports as unjustifiable and in direct contravention of international law and of the assurance given to British Ambassador by German Chancellor. (British No. 156.) 859

179.

Aug. 4: British Foreign Secretary addressed the following note to the British Ambassador at Berlin:

"We hear that Germany has addressed note to Belgian Minister for Foreign Affairs stating that German Government will be compelled to carry out, if necessary, by force of arms, the measures considered indispensable. We are also informed that Belgian territory has been violated at Gemmenich. In these circumstances, and in view of the fact that Germany declined to give the same assurance respecting 860

861 *Stipulation as to Facts.*

Belgium as France gave last week in reply to our request made simultaneously at Berlin and Paris, we must repeat that request, and ask that a satisfactory reply to it and to my telegram of this morning be received here by 12 o'clock to-night.

862 If not, you are instructed to ask for your passports, and to say that His Majesty's Government feel bound to take all steps in their power to uphold the neutrality of Belgium and the observance of a treaty to which Germany is as much a party as ourselves." (British No. 159.)

180.

863 Aug. 4: The French Government issued the following decree declaring a state of war with Germany, and handed a copy to the United States Ambassador:

"The German Imperial Government, after having allowed its armed forces to cross the frontier, and to permit various acts of murder and pillage on French territory;

864 after having violated the neutrality of the Grand Duchy of Luxemburg in defiance of the stipulations of the Convention of London, 11th May, 1867, and of Convention V. of the Hague, 18th October, 1907, *on the rights and duties of Powers and persons in case of war on land* (Articles 1 and 2), Conventions which have

been signed by the German Government; after having addressed an ultimatum to the Royal Government of Belgium with the object of requiring passage for German troops through Belgian territory in violation of the Treaties of the 19th April, 1839, which had been signed by them, and in violation of the 866
above Convention of the Hague.

"Have declared war on France at 6.45 P. M. on the 3rd August, 1914.

"In these circumstances the Govment of the Republic find themselves obliged on their side to have recourse to arms.

"They have in consequence the honor of informing by these pres- 867
ents the Government of the United States that a state of war exists between France and Germany dating from 6.45 P. M. on 3rd August, 1914.

"The Government of the Republic protest before all civilized nations, and especially those Governments which have signed the Conventions and Treaties referred to above, 868
against the violation by the German Empire of their international engagements, and they reserve full right for reprisals which they might find themselves brought to exercise against an enemy so little regardful of its plighted word.

869 *Stipulation as to Facts.*

"The Government of the Republic, who propose to observe the principles of the law of nations, will, during the hostilities, and assuming that reciprocity will be observed, act in accordance with the International Convention signed by France concerning the law of war on land
870 and sea.

"The present notification, made in accordance with Article 2 of the Third Convention of the Hague of the 18th October, 1907, relating to the opening of hostilities and handed to U. S. Ambassador.

"Paris, August 4, 1914, 2 P. M."

181.

871 Aug. 4: German steamship *Ophelia* cleared from the Custom House at London and sailed for Hamburg.

182.

Aug. 4: Hamburg-American Line steamer *Slavonia* passed Dover from Libreville, French Congo. (Times, August 5.)

183.

Aug. 4: Germany, prior to 9 P. M., declined to give the assurance requested by
872 Great Britain in its note of August 4, respecting the neutrality of Belgium. (British No. 160.)

184.

Aug. 4: England issued the following declaration of war:

"A State of War.

"His Majesty's Government informed the German Government on

August 4th, 1914, that, unless a satisfactory reply to the request of His Majesty's Government for an assurance that Germany would respect the neutrality of Belgium was received by midnight of that day, His Majesty's Government would feel bound to take all steps in their power to uphold that neutrality and the observance of a treaty to which Germany was as much a party as Great Britain. 874

"The result of this communication having been that His Majesty's Ambassador at Berlin had to ask for his passports, His Majesty's Government have accordingly formally notified the German Government that a state of war exists between the two countries as from 11 P. M. to-day. 875

"Foreign Office,
"August 4th, 1914."

Supplement to The London Gazette of August 5, 1914.

185.

Aug. 5: Austria declared war on Russia. 876

186.

Aug. 7: Montenegro declared war on Austria.

187

Aug. 8: Servia declared war on Germany.

188.

Aug. 10: France severed diplomatic relations with Austria.

189.

Aug. 12: England declared war on Austria.

190.

The German law may be proved by offering in evidence a translation of the German Maritime Code without producing an expert to testify but subject to all objections except as to the competency of the mode of proof, and subject to correction of the translation.

191.

The sailing of the *Kronprinzessin Cecilie* with a large amount of gold bullion was contemporaneously published in the leading newspapers of America and Europe.

192.

This stipulation is without prejudice to the right of any party to challenge the materiality or relevancy of any of the facts stipulated.

Dated March 31, 1915.

CONVERS & KIRLIN,
Proctors for Libelants,
except Nat. City Bank.
CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

CHARLES W. RANTOUL, JR., sworn:

By Mr. Hickox:

Q. Mr. Rantoul, you are a resident of New York City, are you? A. I am, yes.

Q. And a graduate of Harvard of 1887? A. Yes.

Q. And engaged in business in New York now? A. I am, yes; paper and pulp business,—the importation of pulp,—the importation and sale of paper and pulp.

881

Q. Under what circumstances did you start your trip to Europe on the *Kronprinzessin Cecilie* last July? A. I had a business interview the noon of the 27th; and at the termination of that, at quarter past one, I decided to go immediately to Norway and Sweden to complete a contract for pulp. I took the first available boat, which sailed that night, the *Kronprinzessin Cecilie*, and embarked on her just before midnight of the 27th, and sailed I think about one o'clock A. M. on the 28th.

882

Q. Had you purchased a ticket before you went on board? A. No, I got the ticket after I reached the ship. I simply went down to the ship and took my chances of what I could get after I got there.

Q. How did you get your ticket and from whom? A. I bought the ticket in the purser's office from a man who I understood was the agent of Oelrichs & Company; that is, it was not the purser.

883

Mr. Larocque: We object to his understanding about it, if your Honor please.

The Witness: I did not buy it from the purser, but from another man in the purser's room.

The Court: It may be struck out. I do not see that it is very material.

884

Q. To what port did you buy passage? A. Plymouth.

Q. Did you pay for a passage to Plymouth? A. I did.

Q. Did you receive a ticket? A. I received a ticket or receipt, something of that sort.

Q. Did you sign a ticket that was given to you? A. I think so.

885 Mr. Larocque: I object to that as immaterial and irrelevant.

Q. Mr. Larocque produces this ticket. Is that the one that you signed [passing the witness a paper]? A. Yes, that is my signature.

Q. Before you signed this, did you examine the ticket? A. No, not especially. I had it, I put
886 it in my pocket, but I did not examine it to read it.

Q. This ticket provides for passage to Cherbourg. Did you at any time suggest to anybody, before you bought this ticket, that you wished a passage to Cherbourg?

Mr. Larocque: One moment. That is objected to as incompetent, irrelevant and immaterial. That is a contract on its face.
887 The witness cannot contradict it.

The Court: You do not insist upon the words "to anybody?" You mean, by that, to the person from whom, or to the authorities of whom, he purchased the ticket, do you not?

Mr. Hickox: I meant it generally to include everybody, but I will specify, "any one with whom you dealt in regard to
888 your passage."

Mr. Larocque: What is the question now?

The Court: The question is, Did he to any one with whom he dealt in relation to his passage, do what?

Mr. Hickox: Suggest that he wished passage to Cherbourg.

Mr. Larocque: We object to that as im-

material, irrelevant and incompetent. The ticket speaks for itself, and that is the contract.

Mr. Hickox: On the contrary, the law is, that the ticket is not the contract, but that it is merely evidence of the contract.

The Court: I do not know what may appear later. He may answer. If it shall be immaterial, it is not before a jury, so that the probative value of the testimony is to come before the Court. He may answer *de bene.* 890

Mr. Larocque: We will save an exception.

The Court: Yes. I am not going to receive it except *de bene.* Then I will pass upon it later.

891

A. No.

Q. Were you ever aware, until you were advised by us of a communication from the attorneys for the *Kronprinzessin Cecilie,* that it was ever claimed by anybody that you had taken passage to Cherbourg? A. No, I had no idea of it, because I had no intention of going to Cherbourg.

Mr. Larocque: That is objected to on the same ground. 892

The Court: It is admitted the same way.

Q. Did you obtain tags for your luggage? A. I did.

Q. And did you put tags on your luggage? A. I did.

Q. Have you with you a piece of your luggage with the tag that you placed on it at the time? A. I have one piece.

893 Q. Will you produce it, please?

[The Witness produces a piece of baggage.]

Q. And what is the tag? A. The tag is a North German Lloyd tag, "State Room Baggage, Plymouth."

894 Mr. Hickox: I offer the tag in evidence. I presume that the piece of luggage does not have to go with it.

Q. Has that tag been attached to that piece of luggage since last July? A. Yes, it has not been removed since I put it on there in July.

The Court: By agreement, if it is material, it may be removed from the luggage
895 and shown to counsel on the other side, and admitted subject to objection.

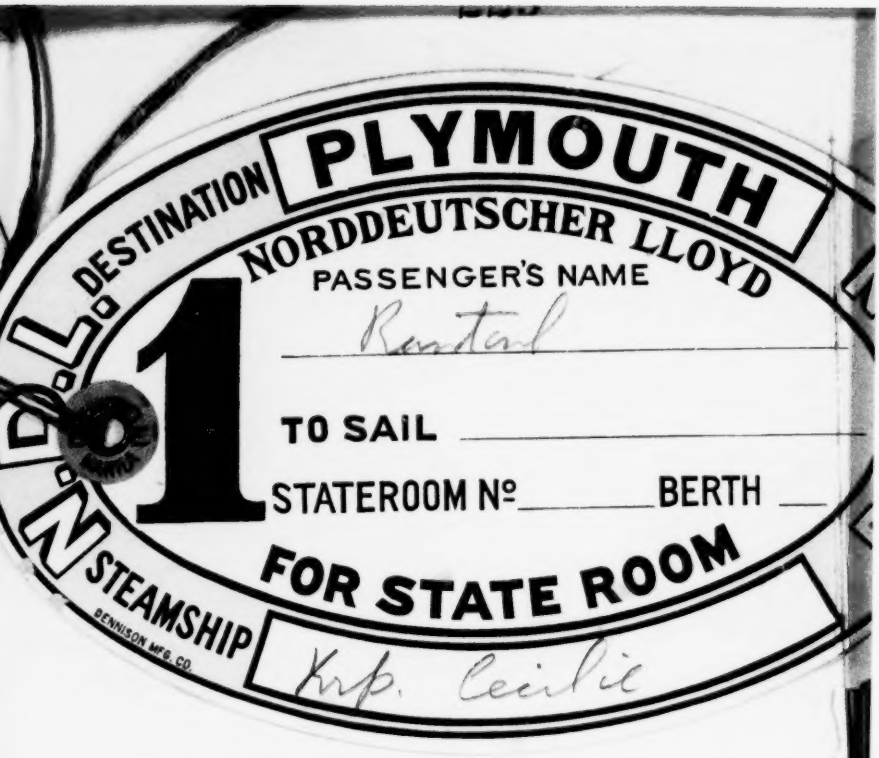
Mr. Larocque: I do not like to interrupt, but I should like it to appear on the record that we object to all this line of testimony as an attempt to contradict the plain terms of the contract.

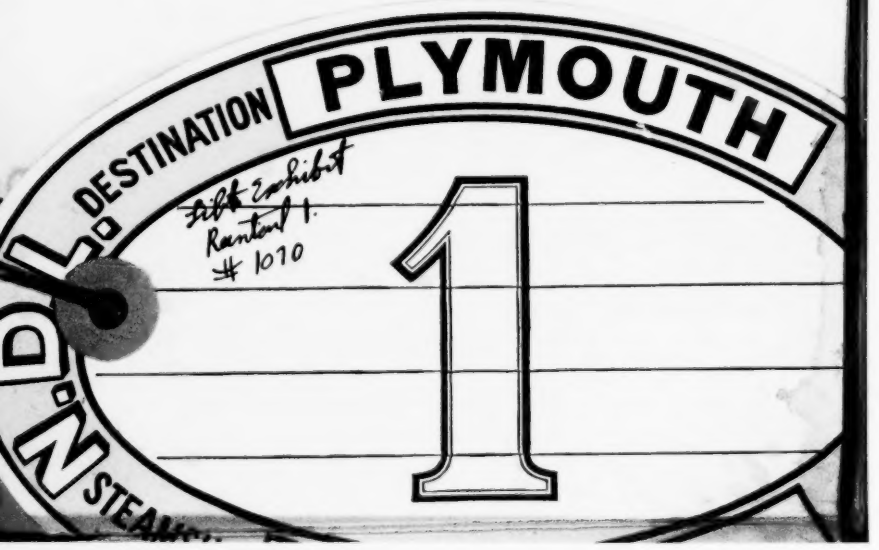
The Court: Yes. I will admit it all *de bene* and then we will consider its bearing later.

896 The Witness: Shall I remove this tag?

The Court: You may remove it; and the record may show that the witness removes the tag from the luggage, and the tag is shown counsel and is introduced in evidence subject to objection.

[The tag is removed from the piece of luggage, is shown to counsel, and is marked "Libelant's Exhibit Rantoul 1."]


DESTINATION
PLYMOUTH
NORDDEUTSCHER LLOYD
PASSENGER'S NAME
Rentzel
1
TO SAIL
STATEROOM Nº
BERTH
FOR STATE ROOM
STEAMSHIP
Krp. Cecilie
BENNISON MFG. CO.


DESTINATION
PLYMOUTH
Libel Exhibit
Rentzel 1.
1070
1

901 *Charles W. Rantoul, Jr.,—Direct.*

Q. Mr. Rantoul, when did you sign the back of this ticket?

The Court: The ticket is not offered or marked?

Mr. Hickox: No.

A. I could not tell the exact date. Probably,
902 as near as I could fix it, the same time, on the 28th,—and handed it to the steward.

Q. You signed this on board? A. On board.

Q. And was this writing up above, "Received $131.45, New York, August 10, 1914," on it at that time? A. No, it was not.

Mr. Larocque: I think the ticket should be offered in evidence.

Mr. Hickox: I am not offering it in evi-
903 dence.

Mr. Larocque: You are examining the witness, then, as to a paper which is not in evidence nor even offered for identification?

Mr. Hickox: Yes.

The Court: Don't you want to offer it?

Mr. Hickox: No, I do not want to put it in.

904 Mr. Larocque: Then I will offer it in evidence and ask that it be marked.

Mr. Hickox: You will have a chance in just a moment.

Q. In consequence of the failure of the steamer to deliver you at Plymouth, have you suffered financial damage? A. I have.

Q. Substantial damage? A. Considerable damage.

905 Q. Will you state, Mr. Rantoul, what was the first intimation that you had, and from whom you had it, that the steamer had turned around on her voyage. A. I was in the lounge somewhere about ten o'clock on the night of the last day of July, and a young boy about fifteen years old, whose name I do not know, came in there and said, "Gee, we have turned around. The 906 moon was on this side of the boat, and I was out on deck watching it, and it is on the other side of the boat now, and we must have turned around." Everybody went out on deck and found that was so. That was the first intimation that I had that the boat had actually changed her course. Shortly after that, in the smoking room, Captain Polack came in and made the announcement.

907 Q. What did he say? A. Speaking from memory, he said, "Gentlemen, I ask for your attention for a few moments. I have just received a wireless notice that war has broken out between Germany, France, Russia and England; and I am instructed to return at once to—America," I think he said. "I wish to say that we have plenty of coal to make the return voyage, plenty of provisions on board, and there need be no anxiety on that score. I would ask 908 the gentlemen to support me in making this return voyage as successful as possible, and particularly in seeing that the ladies of the company are not unduly anxious over this turn of events."

Q. Did you get any further statement from the master, of the progress of events on the voyage back to America? A. None at all, ex-

909 cept the printed slip which was posted, from the captain. The captain was not in the passengers' part of the ship during the balance of the voyage.

Q. Did they publish on the vessel a paper of any kind of publication? A. They had done so up to the time we turned about. My impression
910 is, that was discontinued after we turned around.

Q. Is that pamphlet that I show you, entitled "Ocean Gazette," something that was published on board and delivered to the passengers? A. Yes, that was handed around every day as long as it was published.

Q. And what date did you get this? A. 31st of July.

911 Mr. Hickox: I offer that in evidence as Rantoul Exhibit 2.

The Court: As tending to show what?

Mr. Hickox: As containing certain information disseminated to the passengers.

The Court: Touching the adventure?

Mr. Hickox: Touching the general situation and also the distances covered by the vessel, etc.

912 The Court: Show it to counsel and see if there is any objection.

(Mr. Hickox passes the copy of the "Ocean Gazette" to counsel for claimant.)

Mr. Noyes: No objection.

The Court. No objection. Admitted without objection.

(The copy of the "Ocean Gazette" re-

ferred to is marked "Libelants' Exhibit Rantoul 2.")

LIBELANT'S EXHIBIT RANTOUL 2—No. 1070.

OCEAN GAZETTE

Norddeutscher Lloyd—Bremen.

On Board the *S. S. Kronprinzessin Cecilie*

Atlantic Ocean Friday, July 31st, 1914. 914

TELEFUNKEN NEWS

of the Norddeutscher Lloyd
received from the High Power Stations
at Sayville and Norddeich

STATION AT SAYVILLE

Distance 1,500 miles.

LONDON. Germany sent an ultimatum to 915
Russia, demanding an explanation for the latter's mobilization. The answer is to be given within the next 24 hours.

—— Fighting between Austrian and Servian forces is reported today at several points and the invading forces are meeting with stout resistance. Despatches received at the Servian legation in London say that the Austrians were repulsed, while trying to cross the Danube twenty miles east of Belgrade and at Losnitza, 916
west of Belgrade.

—— The southern column of Austrians in Bosnia is reported to be watching the Montenegrin troops. In a severe battle at Fotcha in Bosnia the Austrians defeated the Servians with several hundred killed on each side.

—— The gravity of the international situation is recognized in all European capitals.

917 Russia proceeded with her mobilization of a large number of troops while the French defensive forces took extensive precautions.

LONDON. Business was practically suspended on the London Stock Exchange today, pending the serious war situation. Dealers refused to make prices. The consols reached a
918 record low price of 69½, the lowest in a century. Seven failures were reported today. St. Petersburg, Vienna, Budapest and Brussels Exchanges also remained closed; two failures were announced on Glasgow Exchanges.

—— Investigation shows that American travellers have not been influenced by the war alarm and continue booking for continental tours, trusting to escape in the event of a general war in Europe.

919 —— Two militant suffragettes, one of whom was Mrs. Dacre Fox, today invaded Buckingham Palace in a further effort to present a petition to King George. They were both arrested.

BERLIN. A Potsdam banker, Eugen Biber and his wife, committed suicide in a Berlin hotel today, because they had lost over sixty-two thousand dollars since the beginning of
920 the war crisis.

TOKIO. The "Shimbum" a semi-official newspaper of Japan, declares today that if England is attacked, Japan will give assistance to the British arms.

WASHINGTON. Administration officials are awaiting additional developments in European politics. If other nations than Austria and Servia are drawn into the conflict, probably a

proclamation of neutrality covering the entire situation will be determined upon by the State Department.

NEW YORK. There was considerable buying of war risk insurances covering gold exports again today. The rate was one per cent for war risks.

—— The severe declines in stock exchange prices which occurred today, are the most drastic since 1907. 922

Results of Baseball games in America.

* * *

Market Quotations of Stocks

* * *

WIRELESS TELEGRAPHY

Communication will be established today with the following steamers: 923

S. S. Vaderland, Brandenburg, Mongelian, Bergensfjord, Arabic, Kaiser Wilhelm II, Pallanzas, President Lincoln.

OCEAN-LETTERS

There is a good opportunity to communicate with your friends and family by taking advantage of our newly introduced "Ocean-Letter Service." 924

These "Ocean-Letters" are transmitted by wireless to a German ship going in the opposite direction. The boat to which these "Ocean Letters" are transmitted, will mail them at its first port of call as registered letters.

Rate: 5.50 Mark for 30 words.

Each additional word 10 Pfg.

For information please apply to the wireless office.

925 *Charles W. Rantoul, Jr.,—Direct.*

ABSTRACT OF LOG.

July 1914	Miles	Lat. N.	Long. W.	Remarks.
28	196	40° 10′	69° 35′	Overcast; rainy; light sea.
29	535	40° 10′	57° 55′	Cloudy; moderate sea.
30	534	40° 15′	46° 22′	Cloudy; hazy; moderate se
31	549	45° 25′	35° 36′	Cloudy; moderate sea.

926 Distance till noon 1,814 miles.

Q. And I also show you an "Ocean Gazette" dated July 29th. Was that also published on board and given to you on July 29th? A. Yes, it was.

Mr. Hickox: I offer that as "Libelants' Exhibit Rantoul 3."

927 [The copy of the "Ocean Gazette" of July 29th is passed to counsel for claimant.]

The Court: That is another paper, of another date?

Mr. Hickox: Yes, a different date.

The Court: Any objection?

Mr. Larocque: No.

The Court: Admitted without objection.

928 [The copy of the "Ocean Gazette" on July 29 is marked "Libelants' Exhibit Rantoul 3."]

LIBT. EX. RANTOUL 3—#1070.

OCEAN GAZETTE.

Norddeutscher Lloyd—Bremen.

On Board the S. S. *Kronprinzessin Cecilie.*

Atlantic Ocean, Wednesday, July 29th, 1914.

TELEFUNKEN NEWS.
of the Norddeutscher Lloyd,
received from the High Power Stations
at Sayville and Norddeich.
STATION AT SAYVILLE.
Distance 420 miles.

London: A formal declaration of war was 930
made by Austria on Servia today and active hostilities between the two countries have already begun. Two Servian steamers were today attacked on the Danube, the Servian colors hauled down and the Austrian colors hoisted.

—— Germany has declined the proposal of Sir Edward Grey for a conference of ambassadors of the powers in London; Austria also formally declined the proposals. Orders for the German fleet to concentrate in home waters 931
have been issued and the British first and second battle squadrons are in readiness for service.

—— A despatch from Berlin says a Russian force has occupied positions near the frontier of Russian Poland and that a squadron of German cavalry has also advanced to the frontier.

—— Emperor Franz Josef has granted complete amnesty to all Austro-Hungarian subjects 932
who have deserted from the army or who emigrated to other lands to avoid military duty.

Vienna: The text of Austria's declaration of war on Servia reads as follows. "The royal government of Servia not having replied in a satisfactory manner to the note remitted to it by the Austro-Hungarian minister in Belgrade on July 23rd, 1914, the imperial and royal government

finds itself compelled to proceed to safeguard its rights and interests and to have recourse for this purpose to force of arms. Austro-Hungary considers itself therefore from this moment in a state of war with Servia.

Signed: Count Berchtold.

Minister for foreign affairs of Austro-
934 Hungary.

Paris: Mme. Caillaux, wife of the former premier-minister of France, who shot and killed Gaston Calmette, editor of the "Figaro" in his office on March 16th last, was acquitted today.

Dortmund, Germany: In a fire in the Ranseman coal mines today fifteen men lost their lives.

Goodwood Park, England: The running of the
935 race for the "Steward's Cup," valued at three thousand dollars with a fifteen hundred dollars trophy, resulted in a dead heat between "Golden Sun" and "Lord Anandale;" "Castillon" was third.

Horta, Azores: Sir Thomas Lipton's newest challenger "Shamrock IV." arrived here today on her way to the United States. She was seven days out from Falmouth, England, and is prov-
936 ing herself entirely seaworthy.

New York: Intense excitement is reigning on the stock exchange here and prices are 2 to 6 points lower.

Chicago: The wheat market was three cents a bushel higher on the war declaration.

Freeport: With the return today of Dr. and Mrs. Edwin Carman, William B. Baily, whose wife was slain in Dr. Carman's office, called upon

District Attorney Smith and later was reported by friends intending to place the prosecution of his case in the hands of Governor Glynn.

Results of Baseball Games in America.

* * *

Market Quotations of Stocks.

* * *

938

WIRELESS TELEGRAPHY.
Communication with
CAPE RACE (New Foundland).

Communication will be established today with the following steamers: S. S. *Cambrian, Wittekind, Manxman, Adriatic, Alaunia, Empress of Britain.*

Abstract of Log.

939

July 1914	Miles	Lat N.	Long. W.	Remarks.
28	196	40°10′	69°35′	Overcast; rainy; light sea.
29	535	40°10′	57°55′	Cloudy; moderate sea.

Distance till noon; 731 miles.

Mr. Hickox: There were other copies issued from day to day, and perhaps we will have leave to put them in later on. That is all.

940

Mr. Kirlin: May it appear that leave is reserved to us to submit these by putting in the journals of the other dates?

The Court: Yes. I do not think there is any need of making any legend about it in writing. I presume there will be no objection.

941 *Charles W. Rantoul, Jr.,—Cross.*

Cross-Examination by Mr. Larocque.

By Mr. Larocque:

Q. Mr. Rantoul, you have answered certain interrogatories that were put to you by the claimant, have you not, in writing? A. I have; yes, sir.

Q. And in your answer to those interrogatories
942 you have itemized your damages as follows:

"Commission ..... $ 6.25
Value of lost time estimated at.. 5000.00
Inconvenience and worry resulting from failure of steamship and owners to carry out their contract 1800.00"

That is correct, is it not? A. Yes, sir.

Q. You also stated that you probably had not
943 more than fifty dollars in cash? A. Currency.

Q. That is the basis of your claim for damages? A. Beg pardon?

Q. That is the basis of your claim for damages? A. Yes.

Mr. Kirlin: We understand, your Honor, that the amount of his damages is going to be left open for further proof. We have not gone into it.

944 Mr. Larocque: I only want to show the character of them, that is all.

Mr. Kirlin: Very well.

Q. A ticket broker purchased your ticket for you, did he not—someone you met before you went on the steamer? A. As I was going on to the—— May I answer that in my own way?

Q. Certainly. A. As I was going on to the

steamer—through the McAdoo Tunnel, with my bags—it was then late—just as I was getting out of the train, a man who had been in the same car said, "Are you going over to the steamer? I will help you with your bags, because I am going over there." And he assisted me with one of the bags which was rather heavy. Just before we got to the steamer he said, "Have you got a good room?" I said, "I haven't any room." And he said, "I am an agent; and if you do not mind, I would like to buy the ticket for you, because perhaps I can arrange to get you a little better room than you would yourself; it is pretty late to get a reservation, just an hour before the sailing. And I shall get a commission out of it." I said, "All right, go ahead. If you can get me a good room, I shall be glad to have you." That man's name was— I can give it to you. 945 946 947

Q. Well, that is of no importance. A. He made the transaction, the actual transaction, with the—whoever it was, Oelrichs' agent, or whoever it was that sold the ticket in the purser's room.

Q. After your return to this country, Mr. Rantoul, Oelrichs & Company refunded your passage money, did they not? A. They refunded my passage money less the $6.25 which they retained for commission to this man. 948

Q. At the time they made that refund, this same man happened to be present? A. He came in just as we were concluding the transaction at the counter.

Q. And did you not state that he had earned that commission and that he should keep it? A.

949 I stated to him—He said, "I will return to you —or, rather, I said, "You have lost me six dollars and a quarter today." And he says, "How is that?" I said, "Because they have deducted six and a quarter for your commission." He said, "That is all right, I will send you a check for the six and a quarter as soon as I get
950 home." I said, "You need not bother to do that, because you helped me with my bags, and we will call it square." I had no further conversation with the clerk or the office, but merely with this man.

Q. But that was all in the office—that conversation? A. It was in the office, yes.

Q. Now, you bought your ticket at the last moment before the steamer sailed? A. Yes.

Q. And no statement was made by you to the
951 ship owner or the agents as to the purpose of your visit abroad at the time you purchased the ticket? A. No, sir.

Q. Or as to what your ultimate destination was, beyond what was mentioned in the ticket? A. Yes, I rather think I did speak of that; I said that I was going to Norway and presumably would leave the ship at Plymouth—I would buy my ticket—I did not buy it through to Lon-
952 don, I bought it to Plymouth.

Mr. Larocque: I offer the ticket in evidence.

It is marked "Claimant's Exhibit Rantoul A 1070."

NAMES OF PASSENGERS

Received $131.45/100

New York. Aug 10th 1914.

L. W. Rantoul Jr

957 *Charles W. Rantoul, Jr.,—Re-direct.*

Q. After your return to the United States did you, within ten days after landing at Bar Harbor, give a written notice, with full particulars, of your claim, to the ship owner or agent—a written notice with full particulars of this claim? A. Not as far as—no, nothing except through my counsel; and that, I think,
958 was later than that.

Q. Was that within ten days after your arrival? A. I do not recall the date; but I gave no notice individually, unless it was something that counsel gave.

Q. In writing? A. Yes.

Mr. Larocque: I would like to ask now whether any notice in writing was given by the libelant or the proctors for
959 the libelant within ten days after the ship arrived at Bar Harbor, with full particulars of the claim?

Mr. Kirlin: No.

Re-Direct Examination.

By Mr. Hickox:

Q. Mr. Rantoul, when you received this ticket on board, were you asked to sign it at that time?

960 Mr. Larocque: That is objected to on the same ground, that the ticket is the contract, without any signature. We have a long line of authorities on that.

The Court: First, let us get at all the facts.

A. No.

Q. Did you ever read the statements that were

961

printed or written on the face of the tickets? A. I did not.

Mr. Larocque: That is subject to the same objection.

Q. At the time that you bought your ticket and it was delivered to you, was any statement made to you about the terms or conditions on the face 962 of the ticket? A. There was not.

Q. Or was your attention directed in any way to anything that may have been printed or written on it? A. No, it was not.

The Court: Step down. That is all. Next witness.

Afternoon Session.

The Court: I have been looking over that stip- 963 ulation. I think counsel are to be very much praised for being able to get so full a stipulation. You must have saved yourselves a great deal of time.

Mr. Kirlin: We have taken a great deal of time and tried to save your Honor time, by getting so much of it in.

The Court: It is a fine thing. You have saved a great deal of time.

964

Mr. Blodgett: The stipulation with reference to The National City Bank, a separate part of the stipulation, is not yet agreed upon; but Mr. Larocque and the rest of us can probably agree on it this afternoon.

Mr. Kirlin: Your Honor, I understood, you would allow us to take some supplemental matters?

965 *Charles August Polack—Direct.*

The Court: Yes.

Mr. Kirlin: Subject to that, for the present, we now rest.

Mr. Blodgett: In reference to The National City Bank, I understand that there were certain matters that were left for us to go over with Mr. Larocque this afternoon, to stipulate; so we are
966 not ready to go on at the present time.

CHARLES AUGUST POLACK, sworn.

By Mr. Larocque:

Q. Captain, what is your full name? A. Charles August Polack.

Q. And where is your residence when at home? A. Lehe, Germany.

967 Q. How long have you followed the sea? A. Since 1875, in March—end of March.

Q. How long have you been in the North German Lloyd service? A. Since 1886, on the first of August.

Q. How long have you been a master? A. since 1900—July.

Q. And how long have you been master of the *Kronprinzessin Cecilie?* A. Since 1913, in
968 May.

Q. Can you state whether the *Kronprinzessin Cecilie* is built in such a way as to be adaptable for an auxiliary cruiser?

Mr. Kirlin: I object to that.

The Court: What is his age?

Q. How old are you, Captain? A. I have been 55 last January, on the 29th.

969

(The previous question is read as follows: "Can you state whether the *Kronprinzessin Cecilie* is built in such a way as to be adaptable for an auxiliary cruiser?)

Mr. Kirlin: I object to that. There is no suggestion in the answer that this was a warship or *quasi*-warship, and no suggestion that we had any notice, when we made our shipment, that it was other than an ordinary commercial vessel. And if she contained any elements of latent danger of capture, increasing the risk of capture, which were not communicated to us, the claimant certainly cannot take the benefit of that as an excuse for turning back.

970

The Court: It is well-known that a great many vessels of all countries are built with reference to possible use in war.

971

Mr. Kirlin: Yes.

The Court: I do not know that I could say precisely on what issue it bears, but I should hardly wish to exclude the fact, if it is a fact, that she was built with reference to that.

972

Mr. Kirlin: The only object of it can be to lay the foundation for an argument that that increased the danger of her continuing on her voyage. That was not communicated to us in any way. And, on the contrary, the vessel had been trading for years as an ordinary commercial vessel. I submit that it is immaterial, so far as our rights were concerned.

973 Mr. Noyes: The evidence is not offered for that, but it is offered as bearing on that provision of the Hague Convention which you called our attention to, that certain vessels would be simply held and run no risk; and the Hague Convention contains a provision that that does
974 not apply to vessels adaptable to auxiliary cruisers. That is the only purpose.

The Court: If you want to put that in as a part of the general description of the vessel, I do not think I should exclude it. I think you many answer.

Mr. Larocque: Will you answer the question?

Mr. Blodgett: I suppose there is no need of objecting and excepting in each par-
975 ticular case?

The Court: I do not think so. Of course, we are all experienced in the trial of maritime cases. We do not enter into the matters with such closeness as we do in guiding a jury, with reference to the probative value of every little piece of evidence that goes in. I think he may answer.

976 Mr. Blodgett: May it be understood that, in reference to objections that are taken by either counsel, for either libelant, they apply to all the libelants at the same time?

The Court: Oh, yes.

Mr. Blodgett: And that an exception may be allowed without being noted at the time?

977

The Court: Yes—that is, within certain limits. Of course, I do not want you to let it go entirely; but I won't hold you——

Mr. Blodgett: The objection would be called to your Honor's attention.

The Court: Call it to my attention. We might as well have the whole story on behalf of both sides.

978

Mr. Larocque: Would you like to have the question reread to you, Captain?

The Witness: Yes, I should like to have it reread.

(The question is again read, as follows: "Can you state whether the *Kronprinzessin Cecilie* is built in such a way as to be adaptable for an auxiliary cruiser?")

979

A. Yes, certainly she is.

Q. What is her maximum speed? A. Well, generally speaking, her maximum speed is 22½ to 23.

Q. That is, under favorable circumstances? A. We have made as much, under favorable circumstances, as 23.4, average knots through the water, across the ocean, from one port to the other.

980

Q. That is about the maximum? A. That is the most she ever made.

Q. Under the most favorable circumstances? A. Under the most favorable circumstances.

Q. How long was it before the commencement of this voyage that her bottom had been cleaned? A. She was last in dry-dock in December, 1913.

981 *Charles August Polack—Direct.*

Q. So that was about eight months before? A. Yes.

Q. Had she on her any foundations for guns? A. Yes, sir.

Mr. Kirlin: May it be understood that all the questions along that line are subject to the objection?

982 The Court: Yes.

Q. And she has had those on right along? A. Yes, sir; she has them now.

Q. You can see those by looking at the deck? A. Yes, any expert that goes over the ship can see that she has those platforms on her decks.

Q. Now I hand you a little book and ask you to state what that is? It is a German book? A. Yes, that is a pocket-book of the war fleets for
983 1914.

Q. Turning to page 130, will you read page 130 and page 131? Will you read what is at the top of the page? A. [Reading.] "*Voraussichtliche Hilfskreuzer der Grosseren Secmachte.* Probable Auxiliary Cruisers of the Larger Powers."

Q. Now, on that page do you find a list of the German vessels? A. Yes, sir.

Q. Will you kindly read it? A. Shall I trans-
984 late it, sir?

Q. Yes. A. "Germany"——

Q. One minute, first. This book gives the different countries and a list of the possible auxiliary cruisers? A. Yes.

Q. Read, under "Germany," the list.

Mr. Kirlin: Is it "possible" or "probable"?

The Witness: "Probable."

985

Mr. Larocque: "Probable."

Mr. Kirlin: Just what does the book say about it in the heading?

The Witness: "Probable Auxiliary Cruisers of the Larger Powers."

Mr. Beck: What is the German word for "probable"?

The Witness: "*Voraussichtliche.*"

986

Mr. Kirlin: Shall we adopt Mr. Gardin's suggestion,—Mr. Gardin of The National City Bank? He says that means, "that could be used."

The Court: Yes.

Q. Now will you read the list? A. Yes. I must first say that under this heading here are only mentioned ships of at least 18 knots velocity,—18 knots speed.

987

Q. Now, under "Germany" read the list. A. Under "Germany," "Name" and "Year of the Launching"——

Q. Just read the list of the steamers. A. [Reading.] "*Kronprinzessin Cecilie, Kaiser Wilhelm II, Kronprinz Wilhelm, Kaiser Wilhelm der Grosse, George Washington, Prinz Frederich Wilhelm, Berlin* and *Imperator.*"

Q. Are those all North German Lloyd steamers? A. No.

988

Q. Oh,—until the *Imperator?* A. Until the *Imperator.* All the rest are North German Lloyd steamers.

Q. And the *Imperator* is a Hamburg-American? A. Hamburg-American, yes.

Q. Now, do you find the English list, too? A. Yes, sir; right here.

Q. Will you kindly read their steamers? A. The *Aquitania, Caronia, Carmania, Campania*——

989 Mr. Kirlin: What do you mean,—that that is a Government list of similar possible convertible cruisers?

Mr. Larocque: British steamers that could be converted into cruisers.

Mr. Kirlin: What is after the *Aquitania?*

The Witness: After the *Aquitania* is the
990 *Caronia;* then the *Carmania,* and then the *Campania;* and then the *Lusitania* and *Mauretania*——

The Court: Do you care for that whole list?

Mr. Larocque: I only want to show that the other lines had a list also, in case any argument is made that they could have sent by one of these other ships of another line.

The Witness: There are 30 more. The
991 *Teutonic*—have you got the *Teutonic?*

Mr. Beck: I do not understand this is any declaration on the part of the English Government that these English boats are liable to be requisitioned, or that they are in any sense auxiliaries of the English service. Apparently this is a kind of naval gazette stating what boats are adaptable for warlike purposes.

992 Mr. Larocque: You do not appreciate what our point is. Under Article 5 of the Hague Convention, it is provided, with respect to any vessel whose shape indicates that she is intended to be converted into an auxiliary cruiser——

Mr. Beck: "Intended," or "capable of being"?

Mr. Larocque: The word is "intended," I think, or "capable of being."

Mr. Beck: Yes, "capable." There is quite a distinction.

Mr. Larocque: Well "capable of being." That makes it broader. With respect to such a vessel, the provisions of the Hague Convention shall not apply. That is the reason we are offering that.

The Court: Do not take much time about it. You may say "a certain number of others." 994

Q. And how many others are there?

The Court: He said 30 others.

Q. There are some others, are there not, of the English vessels? A. Yes, very many more.

The Court: He said 30 others.

995

Q. And under the "French" how many are there,—about? A. Eleven in the French.

Q. And do those include the faster liners coming to this port? A. Yes,—*La Touraine, La Lorraine*——

Q. That is, of the Compagnie Generale? A. The Compagnie Generale Transatlantique.

Q. And does it include *La Savoie?* A. *La Savoie;* yes sir. There are 29 English ships, sir. 996

Q. Twenty-nine English ships all together? A. Twenty-nine English ships. I believe I counted right.

Q. Now, at the time you sailed, early on the morning of July 28th, how much coal did you have in your bunkers? A. 5,510 tons.

Q. And at the time you dropped anchor at Bar Harbor on the morning of August 4th, how much

997 coal did you have left in the bunkers? A. I had about 450 tons left in the ship.

Q. About how much coal do you use a day A. They show up to 750 tons.

Q. So there was less than enough for one day? A. Yes, according to whether the coal is good or bad. It all depends on that.

998 Q. How long had you been in the harbor before sailing? A. We had been in the port of New York since the 21st of July, sir.

Q. And had you, during that time, read the newspapers and kept in touch with what was going on abroad? A. Yes, sir.

Q. So that when you sailed you thought the situation was serious? A. Yes, sir.

Q. When you turned back to come to this country, you had received a wireless message from 999 the home office? A. Yes.

Mr. Larocque: Do you want to put that in on cross-examination, or shall I put it in now?

Mr. Kirlin: You had better put it in.

Mr. Larocque: I will go back a step.

Q. When you took command of this ship, were you given a sealed package? A. Yes, sir; here 1000 it is.

Q. And were you given instructions, in case you received a wireless message relating to some disease, and signed "Siegfried," to open that package? A. Yes.

Q. At what time did you receive a message on the 31st of July? A. At 10 o'clock in the evening. The message was brought to the bridge, I believe, by the chief officer,—I could not say, sir. He had been in the wireless office.

1001

Q. Did that relate to a disease? Was it in German? A. Yes, sir, it related, in German, that somebody had fallen sick, and was signed "Siegfried."

Q. Perhaps you had better give it in German, and then give it in English.

Mr. Kirlin: You had better just mark it, if you have got it, and put the text in, so we can see it.

1002

Mr. Larocque: Oh, yes; he has that here.

The Witness: I have everything here.

The Court: Put the whole thing right in as an exhibit.

Mr. Larocque: Yes, we will put the message right in.

Q. Is that it? A. Yes, that is the message, and this is the repetition. This came from Polduh—

1003

Mr. Kirlin: That is, the first one?

The Witness: Yes,—from Polduh, just to the north of the Lizard power station. This arrived on the 31st of July at 11:45 p. m. Greenwich mean time.

Q. And at what time, ship's time? A. At 10 o'clock, ship's time.

1004

The Court: That is, quarter of an hour before August 1st?

The Witness: Yes. This is 11:45 Greenwich time. After we pass the fortieth meridian of longitude, your Honor, all the clocks of the wireless operators are set on Greenwich time, because the English power stations begin at a certain minute giving the press, and they have all to be

1005 in attendance as soon as that begins; so they put the Greenwich time in these telegrams.

Q. But that was equivalent to 10 o'clock ship's time? A. That was equivalent to 10 o'clock ship's time; yes, sir.

Q. Is that the message? A. That is the mes-
1006 sage.

Mr. Kirlin: What was the ship's time?

The Witness: The ship's time was 10 o'clock.

Mr. Kirlin: No, but what kind of time was that?

The Witness: That was the time on the preceding noon. We always make up our time for noon of everyday.

1007 The Court: That is, sun time?

The Witness: Yes, apparent time,—yes, sir; for the noon of the day,—of the midday, where we are.

Q. Which is the original? A. This is the first message we received [indicating].

Q. The message is in blue pencil; and under it the writing is in black pencil, or gray? A. Yes, sir.

1008 Q. Well, is the writing in black pencil, the translation of the code? A. Yes, sir; absolutely.

Mr. Kirlin: Into German?

Mr. Larocque: Into German.

Q. And that is what you found, after opening your package, was the meaning, in German, of the code message which you had received? A. Yes, sir.

Charles August Polack—Direct.

1009

Mr. Larocque: I offer it in evidence.

Mr. Kirlin: That is, the second paragraph?

Mr. Larocque: Yes, this is in black, and the other is in blue.

[The wireless message referred to is marked "Claimant's *Cecilie* Exhibit B."]

1010

CLAIMANT "CECILIE" EX. B.

TSCHE BETRIEBSGESELLSCHAFT FUR DRAHTLOSE
LEGRAFIE m. b. h. BERLIN S. S. 61

genommen von Poldhu
r

POLACK
Poldhu

Lfd No. 97 Blatt No. 49153
Vom Empfanger einzusiehende Gebuhren:

Poldhu

Kronprinzessin Cecilie

m

31 7 1914 um 1145 s

rch

Einzusiehen
Collect

Bordgebuhren Mk Pf
Kustengebuhren Mk Pf

1011

Landgebuhren Mk Pf

m

stellt um s durch Bate
t. Scot. Emfange Nr. 2

Sonstige Gebuhren Mk Pf
Summe Mk Pf

m

IO-TELEGRAMM VON BREMEN

mit 9 W den31 7 1914 um s

1012

ERHARD ERLITT ANFALL VON BLASENKATARRH
SIEGFRIED

der krieg ist unsgebrausen mit England, Frankreich Russland Kehrt zuruck nach New York.

ER BEACHTUNG! Beschwerden werden nur bei gleichzeitiger Einsendg dieses Telegramms berucksichtigt!

TTENTION! Complaints can only be satisfied if accompanied by this rm!

1013 The Court: That is in, in all the cases; it may come in generally.

Q. Now, Captain, have you with you the sealed package which you had? A. Yes, sir.

Q. And you cut that open? A. I cut that open; yes, sir.

1014 Q. And have you the contents? A. I have the contents here.

Q. Is that the code? A. That is the code; yes, sir.

The Court: If he does not wish to disclose that code, he need not.

Mr. Laroeque: That is the company's code. I am willing to show it to you.

The Court: We will take his word for it.

1015 The Witness: I have translated it this morning into English.

The Court: I do not care about it.

The Witness: I will read the translation.

The Court: I do not care anything about it.

The Witness: For this war, I don't think it is any good, anyhow.

The Court: I will take your word for

1016 it.

Mr. Kirlin: We want to see just what that was.

Mr. Laroeque: They can see it if they want to, your Honor. This is not the admiralty code; this is the Lloyd code.

Mr. Kirlin: There is no public policy involved in this.

1017

The Court: If any counsel wants to see it, I have no objection. I shall not compel him to disclose anything in the code that he does not want to disclose.

Mr. Kirlin: We want to see, for example, whether that code permitted of a different choice of words than those which were employed.

1018

The Court: You can cross-examine about it if you want to.

Mr. Kirlin: Yes.

Mr. Larocque: I think we had better not have it on the record. Counsel can examine it.

The Court: Let it be understood that, while not on the record, it is susceptible of being examined by counsel.

1019

Q. Will you state, in English, what you found that code message to mean—the words, in English? A. What do you mean—the reading of the telgram?

Q. Yes—of course the first one that you received from the home office.

The Court: Let him read it.

A. The first telegram reads just the same as the second. 1020

The Court: Give the English of it.

The Witness: "Erhard has suffered an attack of catarrh of the bladder."

Q. Now, what did you find, after consulting the code——

1021 Mr. Kirlin: (Interrupting). Is there any signature on it?

The Witness: "Siegfried."

Q. And what does "Siegfried" indicate? A. "Siegfried" means the Board of Directors of the North German Lloyd.

1022 Q. Those are the managing directors? A. Managing directors; and one director or representative signed the orders—signed the code.

Mr. Kirlin: What was the keynote word of that?

The Witness: I beg pardon, sir?

Mr. Kirlin: What was the keynote word of that message which indicated to you that the time had come to open the sealed package?

1023 The Witness: The instruction which goes with it, that I should open it on receiving a message which spoke of some illness, signed "Siegfried."

Q. Now, Captain, will you kindly translate that into English; I mean, translate the meaning of that according to the code? A. "War has broken out with England, France and Russia. Return to New York."

1024 Q. Captain, did you later receive a confirmation of that message? A. Yes, sir; this second message, which came to me on the 2nd of August, via Sayville.

Q. When did you receive this confirmation of that first wireless message? A. I have received the confirmation by another message arriving on the 2nd of August, 1914, at 11 p. m.

Q. That was three days later? A. Yes, sir.

Q. And where did that come from? A. That came from Bremen, via Sayville.

Q. So that had been all the way across the Atlantic and back again? A. Yes, sir.

Q. Now, between the receipt of those two messages, did you receive another wireless message from Germany? A. Yes, sir.

Q. At what time did you receive this other 1026
message that you speak of, and from whom was it? A. This was received on the first of August at 9.40 P. M., and it was sent from Sayville to all ships of the German Society for Wireless Telegraphy.

Q. Is that the message you hold in your hand? A. This is the message I hold here. It is in the code of our Government.

Q. Is there any objection to offering that mes- 1027
sage in evidence? A. No, sir; you can show that to whom you like.

Q. It is only the code itself that you do not want to have shown? A. Yes, it is the code itself, from which the translation is made, and which I have here, and which I will give to his Honor to look at.

The Court: That would only be in order to show the good faith of the captain, and nobody questions his good faith. 1028

Mr. Larocque: I offer that in evidence.

The Witness: I should like to have it back.

Mr. Larocque: We can have a copy made.

The Court: A copy may be substituted so that he may have that back. You had better substitute it very soon, so that he can take it right back.

1029 Mr. Larocque: I will let the chief officer make a copy of it.

The Court: Let the original be examined by counsel if they desire, and then put the copy right in.

[The copy of the wireless message referred to is marked "Claimant's Cecilie Exhibit C."]

1030

Lfd. No. 100
blatt No. 49 150

CLAIMANT "CECILIE" EX. C.

Aufgenommen von Sayville
Sayville
uber Sayville den 1/8 1914 For all debeg ships.
um 9:40 p. m. durch G. K. *Kronprinzessin Cecilie*

Bestellt um 9:45 durch boten Sayville
art ag. Empfangs No. 1. Einzuziehen /M/pfg collect
1031 radio Telegramm von mit 15 W den 1/8 1914
Atlabeg. havaube. kocitileca. mywasopumi. lygebucoku. detizecepe. dicokizoku. fypizonaro. povezotamy.

Drohende kriegsgefahr. Keinen hafen anlaufen England, Frankreich, Russland

Reichsmarineamt.

1032 Q. Will you state what that message was, in English? You first had to translate it according to the Admiralty Code, did you not? A. Yes. Will you give it to me, please? I must see it.

Mr. Larocque: Yes.

[The message is passed to the witness.]

The Witness: [Reading.]

"Received from Sayville
Sayville

"via Sayville Aug. 1st, 1914. For all debeg ships. at 9:40 p. m. by G. K. (Gustav Kaulitz 1st operator) *Kronprinzessin Cecilie*

sent to bridge at 9:45 by messenger. Sayville Collect—Mark—Pfg.
kind service telegram receipt No. 1. ag.
Radio Telegram from with 15 W. (words) the first of Aug. 1914.
"Code as on preceding page.
"Threatening danger of war. Do not touch at a port England, France, Russia.
Country's Naval Office. 1034

" 'debeg' means: All ships fitted with apparatus of the German Wireless Company."

Q. Now, Captain, you had——

The Witness: I beg your pardon just one second. Where do the things go that are taken away here? It is something I should not like to go out of my hands. 1035

The Court: Anything of that sort, Captain, that you want to keep, you can keep, and have copies made.

Mr. Larocque: I understand that the captain does not want a copy of the code book in evidence.

The Court: No, the code is not before us; we do not know what it is.

The witness: That is right.

The Court: No one inquires what it is. 1036

The Witness: That is right,—only the words.

The Court: You are sure you have the proper translation?

The Witness: Oh, yes, sir; I am speaking truthfully here, sir.

The Court: Nobody questions it.

Q. And that message had gone to Sayville from Germany, and then it was repeated back from Sayville? A. Yes, sir.

Q. Now, Captain, after receiving the first message to which you have referred, namely, the message from the North German Lloyd directors, signed "Siegfried," what did you do? Did you turn the ship around? A. After I had opened it and read the message, I immediately gave the orders to turn the ship around to the west.

Q. You say you had kept in touch with the sit-
1038 uation before sailing? A. Yes, sir.

Q. And you knew, in a general way, how critically events had been developing before you sailed? A. Yes.

Q. Had you felt any anxiety as to receiving some message informing you of the present conditions, while you were on the water? A. Of course, sir.

Q. Had you discussed it with your chief officer the night before? A. Yes, sir; I have even asked
1039 other ships about the war; for instance, the *George Washington*, on the previous day.

Q. So that when you received this message from the home office you assumed that the home office was fairly well informed as to the situation? A. Yes, sir.

Q. And what course appealed to your best judgment as the best course to pursue upon receiving that message? A. Well, after receiving that mes-
1040 sage reading "War has broken out with England, France and Russia," there was only one way to do, to go back to the United States, to the west; not to run into any danger.

Q. That seemed to you the best and only course to pursue? A. Absolutely.

The Court: He had specific instructions.

Mr. Larocque: Well, I am asking him what appealed to his judgment, aside from the instructions.

The Court: Aside from the instructions?

Mr. Larocque: Yes.

1041

Q. Aside from the instructions, I am asking you. A. Well, I had already spoken to my chief officer the day before, that I was very anxious to get news from home about the political situation and about this war; because, if we were to run any further, we perhaps would not have coal enough to run if we had to.

Q. So you turned around and put back? A. 1042
Yes.

Q. Did you pick up any other messages on the way back, or did you receive any messages? Have you a record of the messages which you sent out or received? A. Yes. We haven't sent out any message after we turned back, until we arrived at Bar Harbor.

Q. Now, what precautions, if any, did you take to escape observation, on your ship, after you turned back? A. Well, first, in the night 1043
we extinguished our side-lights and masthead lights, darkened the portholes as much as we possibly could, drew the curtains down on the promenade deck to keep the light from shining out of the lounge and of the smoking room.

Q. Did you do anything about your funnels? A. On the next day, when it was nice and smooth, we had fine weather, and I ordered all hands to paint the tops of our smokestacks 1044
black, so as to make us appear, in the distance, as a White Star boat.

Q. Did you intercept any wireless messages on the way back—— A. Yes, sir.

Q.——that contained any communications as to the war? A. Yes, sir. Now, the messages that are intercepted and not addressed to me, I cannot give.

Q. No. A. Because I am under oath to the

1045 German Government with regard to the secret of the telegraph at sea.

Q. Can you state whether or not any messages were intercepted? A. Yes, sir; there were messages intercepted.

Q. And when you arrived near the American coast was any message intercepted which indi-
1046 cated that a British cruiser was somewhere in the vicinity?

Mr. Beck: If he is going to give the message——

Mr. Larocque: I am not going to give any message.

Mr. Beck: I thought the form of your question indicated it. If he is going to give us one message, he had better give us all.

1047 The Witness: I can give you messages from the hostile ships.

The Court: Precisely what is your question?

Mr. Larocque: My question is, whether, at the approach of the American coast, any message—when I said "message," that may have been misleading; I mean whether they ascertained on board
1048 that the wireless equipment of one of the British cruisers was working—whether they heard the click.

The Court: Without any distinct message?

Mr. Larocque: Yes.

The Court: That is, something indicating the proximity of some cruiser?

Mr. Larocque: The proximity of some cruiser. That is all.

1049

The Court: He may give that.

Mr. Beck: Why "cruiser?" The click of a cruiser does not show whether it comes from a cruiser, does it?

The Court: I will take his word, one way or the other. We do not know whether it does or not.

1050

Q. Will you state what the fact is, Captain?

The Court: He may state what the fact is.

A. I will give you what we intercepted on the first of August from the French steamship *La Savoie*——

Q. The *Essex* was what I was asking you about. A. The *Essex?*

1051

Q. Yes. A. Oh, yes—the *Essex.* We heard the British cruiser *Essex* in connection with Halifax, on the 3rd of August, 1914, 1.30 P. M., ship's time, the signs of the cruiser first appearing weak, and getting stronger afterwards. The text followed in code; therefore, we did not put it down.

Q. You did not understand it? A. No, the English code we have not got, and so we did not put it down at all.

1052

Q. Now, upon hearing that, and having it indicated to you that this cruiser *Essex* was somewhere in the vicinity, what did you do; did you call a ship's conference?

Q. How did they know it was the *Essex?* A. Oh, they can hear that.

Q. You mean, when you say "they," the wireless operators? A. Yes.

1053

Mr. Kirlin: They can hear what?

The Witness: That it is the *Essex*. (Addressing one of the wireless operators). You caught the call name, didn't you?

Wireless Operator: Yes, we have got a book of the call names.

1054

The Witness: We have got a book of call names.

Q. Did you call a conference of your officers? A. On getting that in the afternoon, of course, finding that the wireless click of the man-of-war ahead of us—of the *Essex*—under these circumstances, got more distinct, it was a sign that we were approaching him; and as we could not possibly make out whether she was patrol-
1055 ling the coast of Long Island, and the coast up to Boston was patrolled by some other ship which did not give any wireless messages, of course it was very dangerous for us to approach those two principal ports; and, in the afternoon, I called my officers together and said to the chief officer and to the second officer, who were there, "Gentlemen, we are hearing these wireless signs getting nearer; they may be before
1056 New York Harbor, they may be before Boston Harbor; I think it is advisable that we should go out of the way and turn up north and go to Bar Harbor, which is a path which is not trodden so much by steamers of our size and kind."

The Court: In that way, you ran up nearer Cape Sable?

The Witness: Yes, sir; we made for the Banks.

1057

The Court: Made for the Banks, and then ran up to——

The Witness: And then ran up right for Frenchman's Bay.

The Court: A little distance south of Grand Manan?

The Witness: Yes, and from there to Mt. Desert.

1058

The Court: South of Grand Manan, and then went into Bar Harbor?

The Witness: Yes, sir. It was dense fog during the night.

Q. You arrived there safely? A. We arrived there safely, at anchor, at 6 o'clock in the morning of August 4th.

Q. And your passengers were all safely landed? A. Yes, sir.

1059

Q. And the bullion that was on board was safely landed? A. Yes, sir.

Mr. Larocque: That is all, Captain, for me.

Cross-Examination by Mr. Beck:

Q. Captain, this book from which you testified as to the possibility of the *Kronprinzessin Cecilie* being utilized as a cruiser, is not an official Governmental publication? A. No, it is not.

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Q. It is printed in Munich, by a private publisher? A. Yes, compiled by B. Weyer, Kapitanleutenant, out of service.

Q. And is it not a fact that on the title page it says—translating the German—"with partial use from official sources"? A. "Partial use from official sources."

1061 Q. So that it is partly unofficial? A. Yes, it is certainly not absolutely official.

Q. Now, as to the word "*voraussichtliche,*" which you translated "probable"— is not the German word for "probable" "*wahrscheinlich*"? A. "*Wahrscheinlich,*" yes.

Q. And would not a fair translation of "*voraus-*
1062 *sichtliche*" be "possible"? A. Yes, "*voraus*" is "forward"—"looking into the future." "Auxiliary Cruisers which may be used in the future, of the Larger Powers."

Q. Yes, of the Larger Powers? A. Yes.

Q. And thereupon he proceeds to give a number of ships of Germany, England, France, Russia, Italy, the United States, Japan and Austria? A. Exactly; yes, sir.

Q. Now, does that mean anything more than
1063 that the boats named there, either by reason of their speed or by reason of their size, are adaptable, if any one of those nations cares to utilize them for naval purposes, for that purpose? A. Well, certainly these ships to a certain extent have been constructed in a way so as to be utilized as auxiliary cruisers. For instance, our ships have been built with platforms for guns, which are on board now.

Q. Yes, but nevertheless this book—I am speak-
1064 ing now of the book, and not about your suggestion with reference to the ships of the various nations—this book simply purports to give a list of steamers which, by reason of their size or by reason of their speed, in the judgment of the editor of this unofficial publication, might be used by these nations if they sought to requisition them? A. Yes, sir.

The Court: Is it not something more? Are they not, in addition to being fitted for

it by size and speed, also fitted by places for guns and all that? 1065

The Witness: Yes, sir.

Mr. Beck: The captain says that on the *Kronprinzessin Cecilie* that was so; but I was simply trying to get what idea was to be attached to this book.

The Court: Some of the vessels that we have all seen in the English service are fitted the same way, are they not? 1066

Mr. Beck: That is unquestionably true, but I was simply directing attention to the fact that this book is unofficial and does not pretend to state, and could not state, what particular adaptability there is, as to these various boats.

Q. For instance, you would not pretend to say that this book intended to authorize the statement that the *St. Paul* and *St. Louis* and *New York* and *Philadelphia* had platforms for guns? A. I have never been on board of those ships and could not say; but they are ships above 18 knots speed, which it says at the top of what you are reading. 1067

Q. Yes, that is right. A. They are ships of above 18 knots speed, and they can be used for auxiliary cruisers.

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Mr. Beck: Yes, of course, that is so.

The Court: Precisely as, in our Spanish war, some of our boats were used the same way.

Mr. Beck: I take it any boat could be used for some naval purpose, no matter how small and insignificant; and the higher the speed and the greater the size, the greater the possibility.

1069 Q. But what I do want to ask you about, Captain, is the suggestion, which I understand you do exclude from your testimony, that in any official or Governmental way any of these boats were part of the naval service of their respective countries.

Mr. Noyes: There is no claim of that.

1070 Mr. Beck: Then we will pass that.

Q. When did you get this package? A. When I took command of the ship.

Q. How long ago was that? A. Nearly two years ago.

Q. Nearly two years ago. You got it in the office in Bremen? A. I got that from my predecessor.

Q. From your predecessor? A. Yes, sir.

1071 Q. I suppose, without asking for particulars, the signature is that of a North German Lloyd official? A. Yes, sir.

Q. I do not want to bother you about the details of it, because I do not want to pry into it. A. I have translated it all, this morning.

Q. I only want to call the Court's attention to this fact, in which you will kindly bear me out: In the first place, the whole code has reference to

1072 a possible war? A. Yes, sir.

Q. Everything has reference to a possible war? A. Yes, sir.

Q. In the second place, there are two messages which might be called the "basic messages;" and the first of those two messages means, "War threatens with?" A. "War threatens with."

Q. Leaving a blank? A. Yes.

Q. And the second is, "War has broken out with"? A. Yes, sir.

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Q. Then follow the code words for "England, France, Russia," separately? A. Yes, sir.

Q. Or "England and France" or "France and Russia"? A. Yes, sir.

Q. Or "England, France and Russia"? A. Yes, sir.

Q. Now, therefore, it would have been quite practicable, on this night of July 31st, for the owners of this boat, by code, to have telegraphed you that "War threatens with" a nation, instead of saying "War has broken out"? A. Yes, sir; they might have done that.

1074

Q. Well, I only want to get the fact that the code was so phrased that it was not necessary for them, for want of an appropriate code word, to send a message that war had broken out with England, France and Russia. That was not necessary; I mean, it was not necessary so far as the code is concerned? A. We did not have any facts; and really I cannot look into that matter. I simply get this telegram; and if they said "War has broken out," they must have had reasons for sending me such a telegram.

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Q. I do not doubt that, Captain. You do not quite catch my point. It occurred to me before I saw this code that the reason why the owners of the boat sent a message that war had broken out between Germany, on the one hand, and England, France and Russia on the other, although the fact, as a fact, was otherwise, was because there was no code message that would have permitted a more modified statement. But it is correct that they did have a code word that would have enabled them to say, for example, "War has broken out with Russia alone"? A. Yes, sir.

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Q. Or they could have said, "War has broken

1077 out with Russia and is threatening with England and France"? A. Yes, sir.

Q. Or they could have said, "War has broken out with Russia and France and is threatening with England"? A. Yes.

Q. Or they could have said, according to another code word, "War has broken out with
1078 France and Russia, but England is doubtful"? A. Yes, sir.

Q. Because there was an expression that would indicate a doubtful attitude? A. Yes, they could have said all that.

Q. They could have said all that. Now, did you, during these critical days of this outward trip, send any messages to the home office? A. During the critical days?

Q. I mean, during this voyage? A. Of our go-
1079 ing to Germany?

Q. Yes, going to Germany. A. After the 28th?

Q. Yes, after the 28th,—from your ship to the North German Lloyd office? A. No, sir.

Q. Either in New York or in Germany? A. No, sir.

Q. You made no inquiry as to the progress of affairs? A. I made no inquiry except from passing ships.

Q. And at the time you had this message your
1080 boat was still headed for Plymouth? A. Yes, sir.

Q. And making the usual time? A. Yes, sir.

Q. And you had no intention of turning until your owner gave you a positive direction to turn? A. Well, I was very anxious to receive exact news about the political situation, as I told you already, on the evening before, when I got a message from the *George Washington*, first about the weather; and I asked him, "Have

1081

you any war news?" And then he told me, "The last war news from Sayville, which you also have." That was not very much to do me any good.

Q. It was not comforting? A. No, it was not very comforting; and I wanted really to have any information from a friend, so that I could act and do what I had already said, on the preceding day to our chief officer, "I wish we could go back and avoid all this trouble on the other side." And we spoke about it in the afternoon—we spoke about it again after dinner, on the bridge. But, as no definite news were coming forth, I could not possibly act on my—just on the papers which the press gave—only they were very alarming. And if the next evening I should not have received anything, it would have been absolutely necessary——

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Q. Well, now, don't go into what might have happened afterwards, because that is somewhat conjectural; but the point of my question was this——

Mr. Noyes: Let the captain finish his answer.

Mr. Beck: I don't think he ought to say what he would have done in the next twenty-four hours.

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The Witness: Well, I was just going state——

Mr. Beck: I did not mean to interrupt him; but I do submit that, inasmuch as this company defends upon a certain decisive step it took, it is hardly fair to bolster that up by having the captain guess what he might have done in the next twenty-four hours.

Mr. Kirlin: And it is not called for by the question.

The Court: Well, if you desire to make any further question about it afterwards, I will rule upon that; but I think you may proceed.

1086 Q. As a result of this conversation that you had on the bridge with your officers, you reached the decision to keep on to Plymouth? A. Certainly.

Q. That is, you had not reached any contrary intention until you got this message directing you to return? A. I had been going about, all day long, looking for some information from my company, which I was sure would come as soon as they could possibly give it to me; and
1087 even if they should warn me, we would do everything to avoid this ship to be taken by the enemy, not only on account of the passengers and cargo, but on account of the ship as such.

The Court: That is, you mean, Captain, that you were looking, expectant of some information one way or the other?

The Witness: Yes, sir.

1088 Q. But, pending that information, you were still going on? A. I was still going on.

Q. And when you got that message, it relieved you from any further responsibility with respect to the course of your voyage? A. Well, I do not want to just say that, but, as it coincided with the course which I already had pointed out to my chief officer on the previous day, and as the message read, "War has broken out with England, France and Russia," there

was only this way to take. I could not possibly go to the east any more. I had to go back to the west. 1089

Q. Well, while we are on that point, was there anything to prevent your going to the south, to Spain or the Azores? A. Well, that coast was more liable to be defended and protected by the cruisers and the battleships and the torpedo boats of the enemy, as the coast to the west. 1090

Q. But, as a matter of fact, when you went back west, did you not run into danger when you ran across the *Essex?* A. Well, we did not run across the *Essex,* we just heard the wireless click of her.

Q. You apprehended enough to take you out of your course and go up to Bar Harbor? A. That was only one of the few to be contended with on this side, where there were hundreds to be contended with on the other side; not only the English, but the French. The Russians never got out of—I don't think they got out of the Baltic. 1091

Q. When on your eastward course, you did know that the company had a code with which they could advise you, both as to any news and also as to their orders and wishes? A. Yes, sir. 1092

Q. I will just ask one more question. You said, Captain, that you got this (sealed package) from your predecessor? A. Yes, sir.

Q. About two years ago? A. Yes, sir.

Q. What is the significance of that on the envelope; does not that mean that at the close of the voyage you are to deliver it to the German office in Bremen? A. It means, "If you give up your ship to your successor—personally to be delivered to the Nautical Bureau in Bremen."

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Q. That is, if you surrendered the command to another officer, you were to return this, yourself? A. Yes, sir.

Q. And yet your predecessor does not seem to have done that? A. Well, then he has to give it to his follower, to the man who follows him in command. And he has to bring it back to Bremen.

Mr. Beck: That is all right. That is all.

By Mr. Kirlin:

Q. Captain, whatever your own views may have been, as compared with the instructions that were contained in the telegram that you got from your owners, it is a fact, is it not, that you were left no discretion by the orders that you got? A. I was what?

Q. Left no discretion? A. Oh, certainly, it was entirely in my discretion, sir, to do what I chose. If I, for instance, had not enough coal to return to America——

Q. Well, if you had not had enough coal to return to America, you would have made some reply to the message? A. No, I would not have replied. I could not have replied to anybody, because I was too far distant.

Q. Assuming that you had enough fuel to make the voyage, you had to make the voyage that you were ordered to make, had you not? A. Yes, sir.

Q. And that was to turn back to America? A. Yes, sir.

Mr. Larocque: "To New York." And he went to Bar Harbor.

Q. On your way, you changed from New York to Bar Harbor on account of hearing the signals of the *Essex?* A. Yes, sir.

1097

Q. Now, is this code which you found in the sealed envelope, any part of the German Naval Code? A. No, sir.

Q. Is there any public policy which would forbid in any way your giving a copy of this to us? A. Well, if you will not bring it into the papers, I have nothing to say against it. It is for your use, certainly.

1098

Q. To use in the case? A. In the case, yes.

Mr. Kirlin: Now, if your Honor please, I think this code ought to be in evidence.

The Court: I feel like respecting what the captain desires, all I can. Of course, you cannot tell; I suppose the papers might get anything. If you can get such parts of it as you feel are necessary, I do not feel like forcing him, with the possibility of the papers getting it.

1099

Mr. Kirlin: This contains so many alternatives——

The Court: I know, but Mr. Beck has fully brought that out in cross-examination. I think, Mr. Beck, you have so fully developed that point, it does not seem to me I ought to let that go in, in its entirety.

Mr. Beck: I do not think we need it.

1100

The Court: I feel like accepting the captain's answer. He has answered everything with entire frankness and entire clearness; and if he is afraid of that getting into the newspapers, I should not wish to compel him to submit it, in my discretion. If you were to suffer for it, that would be another thing; but I do not think that is so.

Mr. Noyes: We are quite willing to enter

1101 this stipulation in the case, that the counsel for the other side may cross-examine on this fully; and that if this case should go, on appeal, to the Appellate Court, a copy might be presented to that court. We have no desire to keep this out; we simply do not wish to have the code of this company
1102 made public property, so far as this case is concerned.

Mr. Beck: I think that is entirely fair.

The Court: I think it is entirely proper, if the captain has that feeling that he does not want the newspapers to have it, and I shall respect his feeling. I think, as you say, you must see that counsel may copy it and keep a copy if they want to,—either side.

1103 Mr. Noyes: There is no objection.

The Court: Counsel are part of the court; and I do not suppose there would be the least objection to either Mr. Kirlin or Mr. Beck having a copy of it in their pocket.

Mr. Kirlin: I understand the captain's feeling about it. I do not want it to get to the papers.

The Court: If the captain has that feel-
1104 ing about the newspapers, I shall respect it; and I shall not allow it to be so used that the newspapers can get it. As the clerk says to me, if you want, you can leave it with him, and he will see that nobody sees it.

Mr. Beck: If we should decide hereafter that we wanted any part of it, it would be very easy to drop the code word from the record,—it would be easy to say, "The code

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word follows, and it is not important for the interests of the case," and have simply a translation.

Mr. Noyes: If it is simply left that, in case of appeal, it could be used, that is entirely agreeable.

The Court: I shall respect the captain's desire that it should be impossible to get that into the papers. 1106

Mr. Kirlin: I just want to ask one or two questions about it.

The Court: Cross-examine him as fully as you want to.

Q. Captain, the translation of the first code word contained on the sheet which you found in the sealed package, is "War threatens with" blank, is it not? A. Yes, sir. 1107

Q. And the second translation, after the second code word, is, "War has broken out with"? A. Yes, sir.

The Court: Mr. Beck has gone over that with great fullness.

Mr. Kirlin: I do not think he contrasted those two things.

The Witness: Oh, yes, the other gentleman asked me about that before, sir. 1108

Q. And then there were separate code words which meant each one of the three countries? A. Of the three countries, yes.

Q. And there was one code word which, translated, meant all three of the countries? A. Yes, sir.

Q. And that is the word that you found in your message? A. Yes, sir.

1109 Q. Had you received up to that date, that is, 10 p. m. of July 31st, any news, on board your ship, about conditions or developments of the controversy between the Powers, since you had left New York? A. Nothing but what we got through the press, the newspapers, which you have had before you just a while ago, sir.

1110 Q. Had you received any messages from your company prior to this one that has been put in evidence— A. No, sir.

Q. —Since you left New York? A. No, sir.

Q. Had you received any from the agents of your company? A. No, sir.

Q. Had you received any from any other German ship? A. Yes, sir.

1111 Q. What German ship? A. From the *George Washington.*

Q. That, you have already given us? A. No, sir.

Q. Have you not? A. No, sir.

Q. Well, what else did you get from the *George Washington?* A. Which I have told you,—that I asked him whether he had any news of the war; and he told me that he

1112 had his last news from the war, from Sayville, "the same which you also have got," that is what he told me about the war.

Q. Is that all the communication you had with him? A. Then, proceeding from that, he told me that he had, in the North Sea and the English Channel, until 23° west, clear weather; thence fog until 28° west, having now light winds from the north, and clear weather. That is what he stated.

1113

Q. I mean, was that the only message that you received from him? A. This is the only message that I received from him.

Q. Is that the only message you had from any other German ship? A. No, I had one on the morning of the first of August from the *Kaiser Wilhelm II.*, which was going from Europe to New York.

1114

Q. That was after you had turned around? A. Beg your pardon, sir?

Q. That was after you had turned around? A. This was still,—this is Greenwich time, don't you see,—it was at fifteen minutes past twelve in the morning.

Q. Well, had you turned around, or not, at that time? A. We were just doing it; it was just about the time when we turned around, when we received the same message. It was just about the time when we were turning around.

1115

The Court: That you received what message?

The Witness: This that he was telling me, that there is "threatening danger of war." Then it says, "is not declared, but be cautious."

1116

The Court: From whom was that?

The Witness: That was from the captain of the *Kaiser Wilhelm II.*

Mr. Beck: That was half an hour after you had turned around?

The Witness: Yes, it was just in that time,—just in that time, about.

Mr. Beck: But it was half an hour after?

1117 The Witness: Well, it is on the way,—it is made out here, "0.15,"—that is, fifteen minutes.

Mr. Beck: You were just getting under way?

The Witness: We had either just turned, or we were just in the process of doing it.

1118 —or had just turned around. Then we got this message from the *Kaiser Wilhelm II.* And, because it is in,—the message is written in some code words of that secret Government code, I have not given it so far. I gave it to our representatives yesterday.

The Court: That was, that war had not been actually declared, but was threatening?

1119 The Witness: "Is threatening danger of war," it says.

Q. Were any countries mentioned in the telegram? A. No, sir.

Q. Have you given us a complete translation of it? A. Have I given you a translation of this?

Q. Have you given us a complete translation? A. Yes; yes, sir.

Mr. Larocque: Are you speaking of the Government message?

1120 Mr. Kirlin: I am speaking of this message that he got from the *Kaiser.*

The Court: From the *Kaiser.*

The Witness: Yes, sir.

Mr. Noyes: Just give that message again, Captain. I did not get it.

The Witness: I have showed it to you yesterday.

Mr. Noyes: Yes, but I did not get it.

1121

The Witness: It says "Threatening danger of war." Then it says, "Is not declared, but take precautionary measures."

Mr. Kirlin (to counsel for claimant): Have you got the German translation of it?

1122

The Witness: I believe I have given those to you (counsel for claimant), haven't I?

Mr. Kirlin: Give us the German translation of it. That is in the official code, he says. I would like to have the German translation of the code. He says he gave it to you yesterday.

The Witness: Didn't we speak about this yesterday?

1123

Mr. Larocque: When he said he gave it to me, he meant he repeated it to me. He did not give me any writing.

Q. Will you write out, in German, the translation into plain German language, of that message, from the code? A. Write it out?

Q. Yes, so we can have it marked. Do that later, Captain.

1124

The Court: Do it later—or it won't take him but a minute to do it now.

The Witness (after writing upon a sheet of paper): This is the translation. Now, I must say——

Mr. Kirlin: Put the date on that, and what station it came from, and when received.

The Witness: Yes. (Writing the date.)

Q. Is that the time of its receipt, or the date of the dispatch? A. That is the time when it was received on board.

Q. On your ship? A. On our ship.

Q. Just put the word "Received" in front of that—"Received August 1st." A. Yes, sir (writing as requested).

1126 Q. In what position was the *Kaiser Wilhelm II.* at the time she gave you that message? A. I beg your pardon for interrupting, but I must first say this message must, to some extent, be mutilated, as it is not properly worded in German. So I asked him to repeat the message, and never heard any more from him.

Q. What do you mean by saying that the message "must be mutilated?" A. May I have it again?

1127 (The message is passed to the witness).

The Witness: "*War* is not declared." That is what it ought to be, to my opinion. And therefore I asked him to repeat the message—because I think there is something wrong in it. But what we got in the code—this is the translation of it.

Q. I think it is fairly plain. A. It is all I can say. I want to make it as plain to you as I pos-
1128 sibly can.

The Court: This may be put right with the English translation, so they will all form a part of the same exhibit.

Q. Put the English on the foot of that, Captain. It won't take but a moment. A. You can see (indicating)—"precautionary measures."

Q. Don't say it unless that is what it means.

1129

A. That is the translation. There are some gentlemen here who speak German. "Precautionary measures—" I believe that is the proper translation.

Q. Put down what you think it should be. A. "Threatening danger of war. Is not declared, but take precautionary measures."

(The paper is marked "Libelants' Exhibit 4.")

1130

Libt. Ex. 4.

Drohende Kriegsgefahr ist nicht erklart
aber vorsichtsmassregeln treffen.

Telegram from S. S. *Kaiser Wilhelm II.*, received August 1st, 0.15 G.m.t.

Translation.

1131

Threatening danger of war is not declared, but take precautionary measures.

Q. Now, what did you understand that to mean; how did you divide it or punctuate it, in your own mind, when you got it? A. I understood that it is "Threatening danger of war."

The Court: And then a period?

1132

Q. And then a period? A. Yes. "Threatening danger of war."

Q. Yes. A. "Is not declared."

The Court: That is, "*War* is not declared?"

The Witness: That is what I think.

Q. You thought it meant, "Threatening danger of war, but war is not yet declared"? A. Yes,

1133 that is what I thought; that was my opinion; and therefore I asked the wireless operators to ask that the *Kaiser Wilhelm II.* again repeat his message. But he did not say any more.

Q. What you meant a moment ago, when you said that the message was "mutilated," was, that you thought there ought to be a repetition of the word "war"? A. Yes.

1134 Q. A repetition of the word "war" before the word "is"? A. Yes, sir.

Q. And it was not there? A. No, it was not there.

Q. Now, do you know where the *Kaiser* was when she gave you that message? A. I beg your pardon.

Q. Do you know where the *Kaiser Wilhelm II.* was when she gave you that message? A. She

1135 must have been not very far from us, but I do not know where she was.

Q. You know her sailing dates? A. Yes. She must have been about in the vicinity of us.

A Voice: She must have been east of us.

The Witness: Perhaps so,—she could have been.

Q. When did she leave Bremen, what was her

1136 day for sailing? A. I do not think she left Bremen at all, sir. She was run into by the *Incemore,* as you very well remember, in the English Channel, and put back to Southampton with two compartments filled up with water.

The Court: You mean after that message?

The Witness: No, I beg your pardon, your Honor; that was before this. And she sailed directly from Southampton.

1137

Q. After making repairs? A. After making repairs there for about two or three months.

The Court: And reached New York—

The Witness: And reached New York on the 5th of August in the morning.

The Court: And is still there?

The Witness: Is still there; yes, sir. So she did not leave Bremen at all, she did not return to Bremen. 1138

Q. She came out of the Channel? A. She came out of the Channel.

Q. Do you know at what time she left Southampton,—did you know, at the time? A. I knew, at the time when she telegraphed, that she must have left Southampton, but I do not know when she left exactly. But that can be easily found out from the captain of the *Kaiser*. 1139

Q. She is not very different from your own ship? A. About the same. She is our sister ship.

Q. If she did not arrive in New York until twenty-four hours after you arrived in Bar Harbor, the inference would seem to be that she was to the eastward of you when she gave you this message? A. I do not believe so, sir, because Captain Dahl told me that he went over a southerly course and came up under the Jersey coast. She must have been,—I don't know where she has been, but he must have been some place with his ship where he couldn't be suspected. 1140

The Court: Have you given your mileage per day after you turned around?

The Witness: Yes, sir,—yes.

The Court: Have you given it here? I did not notice it.

1141

Mr. Kirlin: No.

Mr. Blodgett: It is in the answers to the interrogatories.

The Witness: The mileage per day,—I have given you that.

The Court: You made pretty fast time, running to Bar Harbor?

1142

The Witness: Yes.

The Court: You made more than average fast time?

The Witness: Well, not always, your Honor. We tried to save as much coal as we possibly could, in case that we should have to run.

The Court: Yes, I see.

The Witness: In case we should have to run some time if we sighted any man-

1143

of-war.

Q. Did you follow the usual course, east bound? A. East bound; yes, sir.

Q. To the point where you turned around? A. To the point where we turned around.

Q. Did you follow the usual course after you turned around until you deviated for Bar Harbor? A. Oh, no, we went away up north, to shorten the distance.

1144

Q. On turning, you headed further to the north than the lane? A. No, we did not head north, but we headed nearly west,—a little to the southward. We have to keep to the south of Cape Race and the Virgin Rocks.

Q. But you went to the northward of the lane? A. Yes, we went to the northward of the lane.

Q. Have you got any tracing of the course you made back? A. Oh, yes. I gave a chart—will you give me that chart? There must be a chart in

1145

one of my books, a small chart,—in this other book.

Q. While he is getting that chart, I will ask you, Did you receive any other messages from other German ships? A. No, sir.

Q. Did you receive any other admiralty messages except the one you have mentioned? A. No, sir.

1146

Q. Have you given the whole of that one? A. Yes, sir.

Q. Have you now given us all the messages that you received from any other vessel, bearing on the subject of the war, from the time you left New York until you got back to Bar Harbor? A. Yes, sir.

Q. Is this the tracing of your course, that you referred to (passing the witness a chart)? A. Yes, sir.

1147

Q. That is correct, is it? A. We made a more correct one on the big chart, which I gave to—

Q. Well, this is approximately correct, is it? A. Approximately correct; yes, sir. If you want me to show you exactly, I have big charts here of the whole ocean.

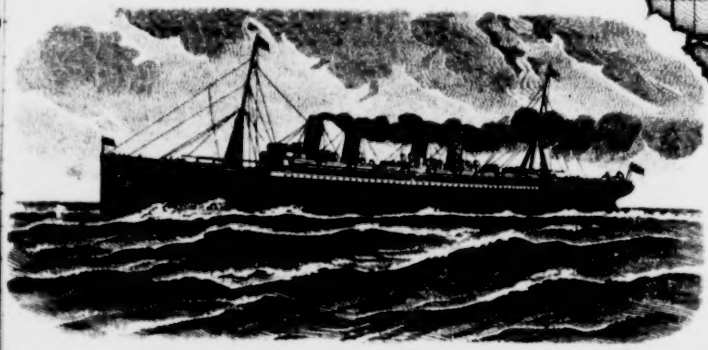
The Court: No, that is all right; I think that is enough.

1148

The Witness: That is substantially the course.

Mr. Kirlin: I will offer this small chart.

(The chart is marked "Libelants' Exhibit 5.")



95 90 85 80 75 70 65

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CANADA

St Lorenz St.

Quebec

Montreal

Portland

Boston

C. Cod

Nantucket I.

N. SCHOTTLAND

Chicago

NEW YORK

Philadelphia

BALTIMORE

St Louis

Delaware Bay

Charles

Chesapeake Bay

Cap Hatteras

VEREENIGTE STAATEN

Mississippi St.

Bermudas

Charleston

Savanah

NEW ORLEANS

Galveston

MEERBUSEN VON MEXICO

Matamoros

Tampico

Havana

CUBA

OELRICHS & Co
AGENTEN.
NEW YORK.

KELLER, BRYA
AGENTE
SOUTHAMP

95 90 85 80 75 70 65

45 40 35 30 25 20

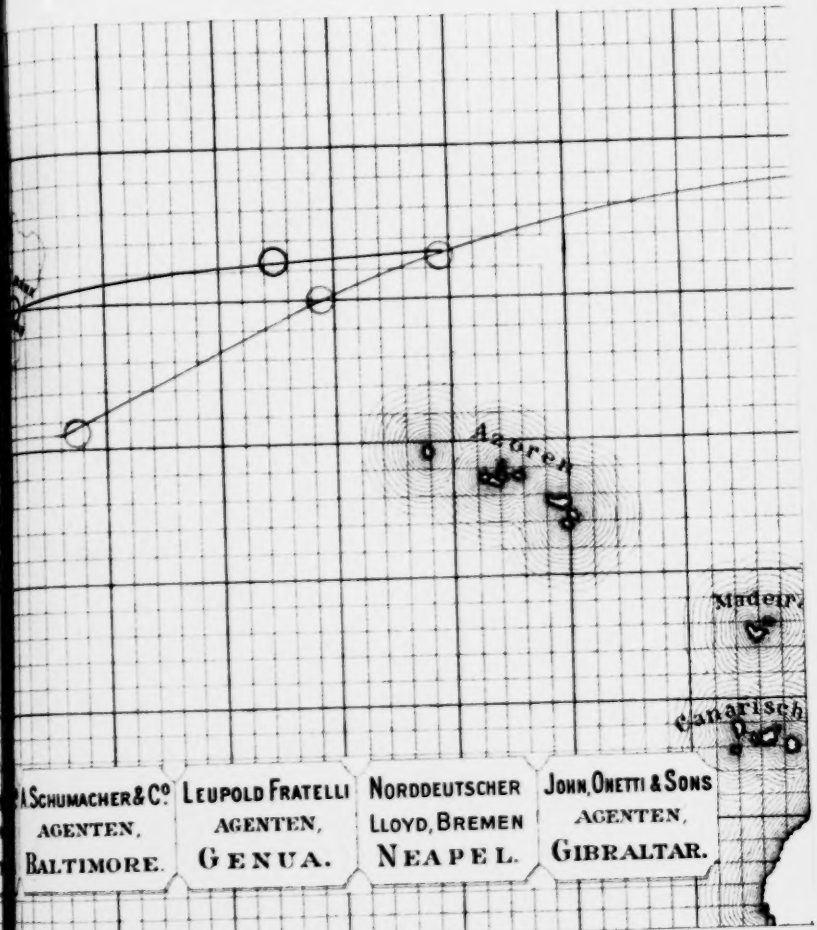
Norddeutscher Lloyd, Bremen.

Dampfer

Abgefahren

Angekommen

Zeit: *Tage* *Stunden*



A. Schumacher & Co.	Leupold Fratelli	Norddeutscher	John, Onetti & Sons
Agenten,	Agenten,	Lloyd, Bremen	Agenten,
Baltimore.	Genua.	Neapel.	Gibraltar.

45 40 35 30 25 20

G. Hunckel, Bremen.

10 Greenwich 5
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5 östl. von 10 Greenwich
60
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SEE
Glasgow
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ENGLAND
LONDON
Dover
Calais
Queenstown
Cork
Clear
Scilly
Portsmouth
Southampton
Havre
Cherbourg
Brest
HAMBURG
Elbe
BREMEN
DEUTSCHLAND
Rhein
PARIS
FRANKREICH
SCHWEIZ
Bordeaux
Genua
ITALIEN
PORTUGAL
SPANIEN
Lissabon
Gibraltar
MITTELLÄNDISCHE
AFRICA
ENTFERNUNGEN:
New York bis Southampton ungefähr 3100 Meilen
Southampton bis Bremen " 420 "
Baltimore bis Southampton " 3300 "
Genua bis Gibraltar " 850 "
Gibraltar bis New York " 3250 "
10 Greenwich 5
0
5 östl. von 10 Greenwich.

Q. You had received certain information, or the operators had received certain information, in addition to that which was directed to you personally? A. Yes, sir.

Q. That, of course, was available to you? A. Yes.

Q. Have you got a list of the messages? A. Yes, but I cannot disclose those, because I am under oath to,—All the captains of the North German Lloyd that have wireless telegraphy are under oath to our Government; and before we are released from this oath, we cannot disclose messages which were intercepted and which were not meant for us,—I mean, which were not sent to us directly. But I can tell you that there is nothing in these messages which in any way would alter the situation,—in no way. This is simply what we picked up, of other ships, where they had left port,—or orders for them to turn around, or such things as that. 1154 1155

Q. Would you be permitted to say whether, prior to the 31st of July, you had received any message— A. Not prior to the 31st of July. This is all after the 31st of July.

The Court: These are all what he picked up on the way back.

The Witness: That is all what I picked up on the way back; yes, sir. 1156

Q. You did not pick up any message from England, before you turned back, announcing that war had broken out? A. Oh, no,—no.

Q. Your vessel had been trading from New York to Plymouth, Cherbourg and Bremerhaven for a number of years, had she not? A. Yes, sir.

Q. She was a regular liner? A. Yes, sir.

Q. Carrying passengers— A. Yes, sir.

Q. —and carrying freight for all who had freight to be carried? A. Yes, sir.

Q. Both ways? A. Yes, sir.

Q. And she made regular sailings? A. Yes, sir.

Q. On schedule advertised a considerable time in advance? A. Yes, sir; on schedule; unless we
1158 were prevented by tides, we always sailed at the proper hour.

Q. This vessel had never been in any war service? A. No, sir; fortunately not.

Q. She had always been used as a commercial vessel? A. Yes, sir.

Q. And she was held out to the public as such? A. Yes, sir.

Q. Now, Captain, it is important to get the exact longitudinal time as of the moment when you
1159 turned around, in order to determine your distance from Plymouth. How did you get that? A. We figured it.

Q. How did you figure it? A. Well, according to the run that we had made until 10 o'clock in the evening, or 10:09, and figured it up to that.

Q. You mean you reckoned your distance from noon until 10 p. m.? A. Until 10 p. m.

Q. On the basis of the speed you had made in
1160 the preceding twenty-four hours? A. Yes, sir,—well, not in the twenty-four hours. We have dead reckoning all the time, don't you see; we put in the log so many miles. We don't see the sun every day,—and no stars.

Q. That is what I say,—you knew that from 12 o'clock until 10 you had run a certain number of hours? A. Yes, sir.

Q. And you got your distance from your noon

1161

position to the assumed position in which you turned, by computing the number of miles, on the basis of the average of the preceding day? A. Yes, sir.

Q. Now, the next day you took— A. We went west.

Q. You got a sight, I suppose? A. Yes, the next day we had fine weather.

1162

Q. Did you check it back? A. Oh, yes, certainly; we knew exactly how far we had gone. There was very little difference.

Q. You had no star sights that night,—you took none, anyhow,—to determine your position? A. No. And if we had, we would have had no time. We simply turned around and made for the west again.

Q. I only want to get the fact about it. A. Yes, sir.

1163

Q. Assuming you were in the position thus arrived at by dead reckoning, how many miles do you say you were on the ordinary course from there to Plymouth Harbor at 10:09 p. m.? A. On the direct course, we were 1,070 miles from Plymouth, just exactly.

Q. Well, the report reached this country in some manner that at the time you turned around you were about 900 miles from your destination.

1164

A. Yes. That was wrong.

Q. How far were you from land when you turned around? A. Well, from the Bishop's Rock to our ship's position that night, it was 971½ miles exactly.

Mr. Kirlin: Probably they were talking about 900 miles from "land" instead of "destination."

The Court: Yes.

1165 Q. What did you find to be your average speed for the run from the preceding day at noon, up to July 30th at noon?

Mr. Larocque: Do you mean July 30th, or 31st?

Mr. Kirlin: From July 30th to July 31st.

1166 Q. What was the average rate of speed that you used as the basis of the reckoning to determine the distance run from noon to 10 o'clock that night? A. Well, we reckon our speed according to the revolutions that are made by the engines.

Q. Well, you made a reckoning. What was the basis of it,—what speed? A. Well, the ordinary speed of the day before.

1167 Q. That is, the average speed? A. Yes, the average speed.

Q. Do you remember what that was? A. May I have this little chart again?

Mr. Noyes: I do not want to interfere with the examination; but in the stipulation we have put, you know, at what time, in the usual course, the vessel would have arrived at Plymouth.

1168 Mr. Kirlin: We have got a margin. I want to find out which of the two it was.

Mr. Noyes: It is only the difference between 11 o'clock and one o'clock.

Mr. Kirlin: Well, there is no objection, I suppose, to my getting it?

Mr. Noyes: No, but I did not know but you had overlooked that.

Q. What was the speed that you assumed you

were making per hour, in making the reckoning that determined your position at 10 o'clock p. m.? A. Well, we reckoned about 22½ miles, further on, as we usually do. 1169

Q. You made more than 22½ the preceding twenty-four hours? A. Yes, but then, you see down there we have the Gulf Stream with us; but we are losing when approaching the English Channel. 1170

Q. Well, you would carry it for a considerable distance from where you were, would you not? A. Not very much. All the last days are very much smaller than the days where we carry the warm water.

Q. How far does the Gulf Stream run to the east, where do you turn off? A. As a matter of fact, I believe it runs all the way to the English shores; and one arm deflects up to the coast of Ireland and goes up to Greenland and Spitzbergen, and so on; but the smaller arm certainly goes over to the coast of England and France; but the current of this southern arm is of very, very little influence to the speed of the ship. 1171

Q. Well, if you had been making 22½ knots, at what time would you have arrived at Plymouth if all had gone well? A. Well, under the circumstances, I believe we would not have arrived before 12 o'clock on the 2nd of August. 1172

Q. Well, you frequently do arrive, do you not, earlier than 12? A. Well, we have arrived earlier than that, but we have arrived later, too. You cannot very well figure a trip like that to minutes; and you cannot say, being here on the stand, when we should have arrived. I can only make a guess what could have happened on the 2nd of

1173 August, going in. We are already on the 31st of July, when ships were coming to this country; the whole Channel was swarming with men-of-war and everything. We have a gentleman right here in the auditorium, who is a captain of our company, who has given me the—

Mr. Noyes: You need not testify to
1174 that, Captain.

Mr. Beck: I think that ought to be stricken out as irresponsive.

The Court: It may be struck out.

Q. You have no knowledge of your own as to any war vessels being in the English Channel? A. No, only what one of our captains has told me.

1175 The Court: Do not go into that.

Q. The answer is "No", not of your own knowledge. A. Very well.

Q. You mean 12 o'clock at night, I suppose, of August 2nd? A. At night; yes, sir.

Q. If you had got in at 11 o'clock or at 11:30, would you have disembarked the gold and passengers that night? A. Certainly. We are allowed to disembark our passengers up to
1176 12 o'clock.

Q. And when you have gold, you disembark that at the same time as the passengers? A. When we have gold, we disembark that at the same time when we take off the passengers,—just before. First, we take on board the gold,—on the tender by which the passengers leave; and then we take down the baggage. In the meantime, on the other side, the mails are taken

1177

down to the tender. And then, when every thing is ready, the passengers are asked to step off the ship.

Q. Now, if you arrive after 12 o'clock, how early in the morning do you begin to disembark? A. In the summer time they allow us to land our passengers at half past five.

Q. And gold and baggage the same way? A. 1178
The gold is landed, or is put on board of the tender before that, while the passengers are sleeping the gold and baggage is landed.

Q. That is, the gold is taken out any time during the night? A. Yes, but the tender does not leave the ship; it leaves the ship only with the passengers the next morning, as there is no train.

Q. Yes, but this regulation about waiting from 1179
12 o'clock to half past five to disembark does not apply to gold or baggage? A. To the gold, it does apply,—and to the baggage also.

Q. You just told us that you took out the gold and baggage before that time. A. Yes, but we put it on the tender, and the tender remains alongside.

Q. Well, I am talking about unloading it out of the ship. A. Yes,—to be quicker the next morning to put the passengers on the tender, 1180
so there is no waiting.

Q. Is this a statement of your sailings and arrivals on a number of voyages in 1913 and 1914 [passing the witness a paper]? A. Yes, sir; these things are made up from the ship's log.

Mr. Kirlin: I will offer that.

The Court: No objection, I suppose?

Mr. Noyes: No.

[The statement is marked "Libelants' Exhibit 6."]

		1913				
6h 00m a. m.	6h 42m a. m.	Monday, July 14 11h 34m a. m.	Monday, July 14 12h 20m p. m.		Tuesday, July 15 10h 00m a. m.	*Did not anchor at Plymouth.
Monday, Aug. 11 6h 12m a. m.	Monday, Aug. 11 6h 55m a. m.	Monday, Aug. 11* 11h 33m a. m.	Monday, Aug. 11 12h 03m p. m.		Tuesday, Aug. 12 9h 21m a. m.	*Did not anchor at Cherbourg.
Monday, Sept. 15 7h 36m a. m.	Monday, Septbr. 15 8h 33m a. m.	Monday, Septbr 15* 1h 30m p. m.	Monday, Sept. 15 1h 56m p. m.		Tuesday, Sept. 16 12h 24m p. m.	*Did not anchor at Cherbourg.
Monday, Octbr. 13 5h 55m a. m.	Monday, Octbr. 13 6h 39m a. m.	Monday, Octbr. 13 11h 33m a. m.	Monday, Oct. 13 12h 09m p. m.		Tuesday, Octbr. 14 10h 51m a. m.	
Wednesday, Nov. 12 9h 51m a. m.	Wednesday, Nov. 12 10h 39m a. m.	Wednesday, Nov. 12 3h 45m p. m.	Wednesday, Nov. 12 4h 15m p. m.		Thursday, Novbr. 13 1h. 21m p. m.	
Monday, Dezbr. 8 9h 00m a. m.	Monday, Dezbr. 8 9h 54m a. m.	Monday, Dezbr. 8 2h 42m p. m.	Monday, Dezbr. 8 3h 12m p. m.		Tuesday, Dezbr. 9 1h. 12m p. m.	
		1914				
Monday, Jan. 26 8h 24m a. m.	Monday, Jan. 26 9h 18m a. m.	Monday Jan. 26 2h 24m p. m.	Monday, Jan. 26 3h 09m p. m.		Tuesday, Jan. 27 1h 27m p. m.	
Friday, Febr. 27 9h 00m a. m.	Friday, Febr. 27 9h 48m a. m.	Friday, Febr. 27* 2h 48m p. m.	Friday, Febr. 27 3h 24m p. m.		Saturday, Febr. 28 5h 00m p. m.	*Did not anchor at Cherbourg.
Monday, March 30 4h 00m a. m.	Monday, March 30 5h 18m a. m.	Monday, March 30 10h 00m a. m.	Monday, Mar. 30 10h 39m a. m.	Tuesday, March 31* 8h 27m a. m.	Tuesday, March 31 1h 18m p. m.	*Anchor at Hoheweg Lighthouse on a/c low tide.
Sunday, April 26 11h 54m p. m.	Monday, April 27 0h 42m a. m.	Monday, April 27 5h 42m a. m.	Monday, Apr. 27 6h 21m a. m.		Tuesday, April 28 3h 27m a. m.	
Sunday, May 24 10h 12m p. m.	Sunday, May 24 10h 54m p. m.	Monday, May 25 4h 06m a. m.	Monday, May 25 5h 12m a. m.		Tuesday, May 26 2h 36m a. m.	
Monday, June 22 0h 12m a. m.	Monday, June 22 1h 12m a. m.	Monday, June 22 5h 42m a. m.	Monday, June 22 6h 39m a. m.	Tuesday, June 23* 4h 45m a. m.	Tuesday, June 23 10h 21m a. m.	*Anchor at Hoheweg lighthouse on account of low tide.
Thursday, July 9 11h 12m p. m.	Friday, July 10 0h 6m a. m.	Friday, July 10 5h 12m a. m.	Friday, July 10 6h 12m a. m.		Saturday, July 11 3h 54m a. m.	
Friday noon 24 miles behind compared with						

1185

Q. If you had got in in time to land your passengers before 12 o'clock on the night of August 2nd,—and your gold,—would you, in ordinary course, if all had been clear, have sailed the same night for Cherbourg, or would you have awaited morning? A. Certainly, we would leave right away.

1186

Q. Leave the same night? A. Oh, yes.

Q. How long does it take you to run over to Cherbourg? A. Well, usually takes us five hours and a half before we anchor on the other side.

Q. Then that would bring you to Cherbourg, assuming you left Plymouth at 12 o'clock— A. We could not have left at 12.

1187

Q. How soon would you leave ordinarily, under the conditions I have mentioned? A. I would not mention any time. After we would have arrived at Plymouth this time, the landing of the gold and the mail would have taken at least an hour, sir. Now, if we say that I would have arrived at 12 o'clock, which I do not believe, we would have been able to leave perhaps at one or a little after.

1188

Q. That would mean six o'clock, then, or half past six, at Cherbourg? A. Half past six or seven o'clock in the morning.

Q. Then, at those hours, would it have been practicable to unload the gold and disembark the passengers at Cherbourg? A. Oh, yes, immediately.

Q. Immediately? A. Immediately; in fact, the tenders are generally waiting for us.

Q. And it takes about the same length of time? A. Not so much time. The mail is smaller, the amount of bullion was smaller;

and there wasn't so many passengers for France.

Q. So, then, you could have got out of Cherbourg— A. Within an hour.

Q. Somewhere between seven and eight? A. About,—between seven and eight.

Q. And, if all went well, what would have
1190 been your running time to Bremerhaven? A. We generally make it in 22 hours.

Q. That is, you would have been in Bremerhaven the next morning about six o'clock? A. Six o'clock; yes, sir.

Q. The morning of the— A. Of the fourth.

Q. —Of the 4th of August? A. Yes, sir.

Q. At either Plymouth or Cherbourg, do you go to a dock? A. That all depends upon the weather, sir.

1191 Q. What is the usual practice? A. If there is a breeze of wind, we go into port, behind the breakwater; but if the wind is light and from the westward, we anchor in Cawsand Bay, which is just three-quarters of a mile from the inside anchorage,—more of an open anchorage than behind the breakwater.

Q. You are now speaking of Plymouth? A. Of Plymouth; yes, sir. We have in fact, al-
1192 ready, in very fine weather, and daytime, landed our mail and passengers, not anchoring at all, keeping the ship going, and the tenders coming alongside.

Q. That is what I wanted to get. You do not go alongside a dock ordinarily? A. No, never; we cannot get alongside a dock in Plymouth.

Q. You unload on tenders? A. Yes sir.

Q. Either anchoring, or without anchoring? A. Either anchoring or without anchoring.

1193

Q. Do you go ashore yourself? A. Never; I have never been ashore in Plymouth.

Q. You do not enter the ship at the Custom House, then? A. No, sir.

Q. Nor clear your ship? A. Our agents do that for us.

Q. And the same thing is true, I suppose, at Cherbourg? A. Yes. An officer of the British Custom House and of the Harbor Board comes off, and all these things are arranged at the purser's office in the presence of our agent.

1194

Q. Yes. Before you left your agent's office, on departing on this voyage, did they give you any instructions, in writing or orally, in relation to this voyage? A. Nothing whatever, sir.

1195

Q. Did they know that you had this sealed envelope on board? A. I do not know whether they did. I have never told them.

Q. It never formed the subject of any conversations between you and them? A. Never. In fact, I am the only one on board who knew anything about the existence of this thing.

Q. Was the matter of the possibility of war intervening before you arrived at Bremerhaven, the subject of any conversation between you and your agents in New York before you sailed? A. No, sir; we never spoke anything about it.

1196

Q. Did you have any communcations from your head office in Bremerhaven, while you were in New York, bearing upon this voyage in any way? A. No, sir; did not hear a thing.

Q. And no communication with them about the existing conditions? A. No, sir.

Q. No message from them at all? A. No message from them whatever.

Q. Either by telegraph or in writing? A. No, sir; nothing at all.

Q. Or by wireless? A. Nothing at all, sir.

Q. Have they a representative in New York other than the agents, Oelrichs & Company? A. We have a manager of our docks, a superintendent of our docks in Hoboken.

1198 Q. Did you have any conversation with him upon this subject? A. No, sir.

Q. Did you receive any communication through him? A. Well, I don't recollect, but I may have said, "The situation is rather threatening." But I do not remember that. I could not say what I have said or whatever it is.

Q. He gave you no orders, at all events? A. He gave me no orders whatever.

Q. Well, did you consider, from what you
1199 gleaned from such sources as were open to you while you were in New York, that there was "threatening danger of war" before you sailed? A. I did not think so, absolutely, that there would be—that war would come out of it. I did not believe it.

Q. What was your view about it when you left? A. Well, as our Emperor was said to be negotiating for peace, and I knew that he had been preserving peace for the time of his reign, I thought
1200 he would endeaver to do everything in his power to avoid this war, and I trusted in him and in his ability to do it—and I am perfectly convinced that he did it.

Q. Well, you had better not state your conviction beyond that point, I think, Captain. That was the thought in your mind up to the time you got this message from your owners, was it—was that the thought that was in your mind until you got this message from your owners? A. Yes.

1201

Q. On the night of July 31st? A. Yes, sir.

Mr. Kirlin: That is all.

The Court: Anything further?

Mr. Larocque: That is all.

Mr. Blodgett: As to The National City Bank case, after we see about the stipulation, there may be some points we shall want to cross-examine the captain on, if we do not come to a stipulation on them.

1202

The Court: But it will be very brief?

Mr. Blodgett: Very brief. The probability is, we shall agree. But the captain will be here, I understand.

The Court: The captain will be in Court tomorrow.

Mr. Larocque: I think we will agree. We have never seen the time when we could not agree with Mr. Blodgett and I think we will this time.

1203

The Court: If there should be a question or two to be asked the captain, he will be here tomorrow morning?

Mr. Larocque: Yes. I offer now—and I understand there is no objection to it, a letter from Oelrichs & Company to my firm, stating the number of passengers that were on the ship, and their nationalities. And I merely wish to add that I have been unable to find out what the 258 passengers' nationality was, that are referred to here. The remainder are given.

1204

Mr. Kirlin: Are you offering this in evidence?

Mr. Larocque: Yes.

The Court: Offered and received without objection.

(The letter is marked "Claimant's *Cecilie* Exhibit D.")

1205 *Charles August Polack—Cross.*

CLAIMANT'S EXHIBIT "CECILIE" D.

Oelrichs & Co.
General Agents,
5 Broadway,
New York.

NORTH GERMAN LLOYD
STEAMSHIP CO.

New York, March 29th, 1915.

Messrs. Choate, Larocque & Mitchell,
40/42 Wall Street, New York.

1206 *in re suits vs. Kronprinzessin Cecilie.*

Gentlemen:

In reply to your favor of the 24th instant, would say that the nationalities represented on board of the *Kronprinzessin Cecilie* sailing July 28th, 1914, from New York were as follows:

	1st cabin.	2nd cabin.	steer-age.	crew.	Tot.
U. S. America...	140	82	132	..	354
1207 Germany	19	21	15	612	667
Austria	3	12	373	18	406
Italy	1	..	2	..	3
Russia	..	..	140	11	151
France	7	..	..	..	7
England	5	9	..	..	14
Australia	..	..	..	1	1
Belgium	2	..	..	..	2
Spain	3	1	..	..	4
1208 Switzerland	1	1	..	..	2
Cuba	3	..	..	..	3
Bulgaria	..	..	8	..	8
Servia	..	..	7	..	7
Roumania	..	..	1	..	1
Greece	..	..	1	..	1
Holland	..	..	..	3	3
Total	184	126	679-989	645	1634
Actual passengers on board	322	131	794-1247	645	1892

1209

As you will see there are 258 passengers of which we have no record, it may be that the purser on board has the information, in which case, Captain Polack can obtain it for you on Wednesday. The information regarding the nationalities of the passengers was obtained from the Immigration Bureau on Ellis Island, that of the crew from the muster-roll on board of the steamer.

1210

Yours very truly,
For Oelrichs & Co.
A. L. Becker.

Mr. Larocque: I offer now a volume of newspaper reports from Germany—reports from July 26th to 31st, 1914; and I make this offer, not as proof of any of the facts referred to in the reports, but merely as showing what the general information was, whether correct or incorrect, that was offered to the public in Germany prior to the time this message was sent out.

1211

Mr. Beck: That is so especially objectionable that The National City Bank will have to object to it.

Mr. Kirlin: We object to it also.

The Court: You have got testimony in your stipulation about certain papers; you have got the testimony, already received, on the stand, from the captain, that he had read and kept in touch with whatever intelligence came from papers. I must exclude the newspaper clippings. Of course, a case of this magnitude must go to the Court of Appeals. I should be afraid to admit newspaper clippings for any purpose.

1212

Mr. Noyes: Would your Honor be willing to defer your ruling on the matter until the morn-

1213 ing; and possibly then we can pick out some particular portions of certain papers and make a more definite and precise offer.

The Court: Yes, you may make your offer of proof; but I do not think, if I should offer to receive it, you would, on reflection, run the risk with the Court of Appeals, of presenting it.

1214 Mr. Larocque: We have given the form of this offer a great deal of thought, for a long time; and we are not offering it as proof of any fact referred to; but we are merely showing that those papers were published in that form, and that the public had access to those reports.

The Court: But you already have affirmative testimony that the captain had read the newspapers and had kept in touch with the situation. It is a matter of common knowledge, you may say,
1215 substantially, what the newspapers were saying. They were giving the facts of the situation. I do not think I can receive that testimony of newspapers; but still, if you like to put your offer, stating precisely what you offer, I will rule on it in the morning.

Mr. Noyes: I think it would be preferable to do so.

The Court: You may do so. I thought it my duty to let you know what my apprehension of it
1216 was. I cannot see how I can possibly allow it.

Mr. Noyes: In order that the counsel on the other side may be apprised, we will tomorrow offer at the same time extracts from newspapers on quite a different line; that is, we shall offer newspapers in which this *Kronprinzessin Cecilie* is spoken of as the "gold ship" and is stated to have had ten millions of dollars of gold upon her; and we shall offer papers of many different

1217

places for the purpose of showing the dissemination of the knowledge that this ship was upon the seas, and to show that she would be a prize which hostile nations would be seeking for. That is the testimony which we will offer tomorrow morning.

The Court: You may put that into affirmative shape, and I will pass upon it.

1218

Mr. Kirlin: I would like to hear from counsel on the other side what their intentions are with reference to the diplomatic correspondence, in relation to which we have made stipulation.

The Court: Let me say, touching the papers that learned counsel speaks of,—the newspaper clippings,—I can see how they might be held by either side to bear upon their side of the controversy. Just as you have agreed here on certain newspaper matters that are in,—

1219

touching the matters of which you speak, it seems to me quite possible that you may be able to agree on certain newspaper clippings of that character, that may be received by agreement. But if you do not agree when the time comes, then we can deal with that matter.

Mr. Kirlin: We have been through the German clippings and have embodied in this stipulation all of them that we can agree to. The

1220

American clippings I have not had any opportunity of going over; but I should think those would be immaterial for very obvious reasons, the principal one of which would be that they could by no possibility have influenced the action of the German owners of the ship in Bremen, or of the master on board, who could

have had no knowledge of them, from his own testimony.

The Court: It is a case of entirely new impression, but I should hardly venture to rule on it now.

Mr. Kirlin: Of course, your Honor knows that the newspapers are very enterprising and
1222 are very likely to state somewhat advanced views on matters which are thought to present a very wide public interest; and there would be very great danger of finding some excess, perhaps, if nothing worse, in the statements in the press, which might be very injurious to a party who has no opportunity of investigating the sources of those publications.

Mr. Noyes: We will put our offer into form.

1223 The Court: What the learned counsel suggests, is an entirely new impression. If the captain had not received instructions from his owners, why, the case would be quite clear, within certain rulings of Judge Curtis in this circuit, and within certain rulings of Judge Curtis followed by John Lowell's rulings.

Mr. Kirlin: May we settle the question of the status of the diplomatic papers and what
1224 is to be done with them under the stipulation?

Mr. Noyes: I should suggest, in regard to the diplomatic correspondence, as I did in regard to the stipulation, that these printed books, the Yellow Book and the Gray Book, etc., be treated as principal exhibits, and not printed in the record, but used in this court as an exhibit, and go to the Court of Appeals as an exhibit.

1225

The Court: Yes, I do not see why it could not go in as a physical exhibit. Let it go in as an exhibit, let it be done by agreement, and argue from it in the Court of Appeals.

Subject to the provisions of Article 14 of the stipulation of March 31, 1915, it is agreed that a bound copy of the diplomatic papers relating to the European war of 1914 be marked as Exhibit Number , and that, in the event of appeal, additional copies of this exhibit may be provided and filed or presented in the Court of Appeals without necessity on the part of any party of reprinting the whole as a part of the record.

1226

SECOND DAY.

Boston, Massachusetts, April 1, 1915, 10 A. M.

1227

The Court: Proceed.

Mr. Kirlin: If your Honor please, I would like to ask the captain one or two further questions.

CHARLES AUGUST POLACK, recalled.

By Mr. Kirlin:

1228

Q. Captain, I wanted to ask you whether the North German Lloyd maintained its own tenders at Plymouth and Cherbourg? A. In Plymouth and Cherbourg?

Q. Yes. A. We have tenders in Plymouth of the Southwestern Railway of England; and in Cherbourg we have tenders of our own, but they are sailing under the French flag. How it is—whether they belong to France, or whether they

belong to the Company, I do not know, but there was one old tender of ours, and we built a new one and sent it over. But they have to fly the French flag.

Q. And they are marked with the colors of the steamships of the line, are they not—the smokestacks? A. Oh, yes, they have the yellow smokestack and black hull.

1230 Q. And in Plymouth are the tenders chartered? A. I think so. I could not possibly tell.

Q. Are they marked with the colors of the line, also? A. Oh, no, they have a red smokestack and black top, as far as I remember.

Q. Captain, do you know whether there are coaling facilities for steamers in Plymouth? A. Well, I should say there are. I have never taken coal in Plymouth.

1231 Q. But it is a large port for passenger steamers? A. Oh, yes.

Q. And it would naturally be assumed there were coaling facilities there? A. Well, it is a port of touch; it is not so much a port of departure. I do not think any lines leave directly from Plymouth. They stop there to pick up passengers. If they come all the way from London, they put into Plymouth and take the passengers that come down by train, to avoid the long trip through

1232 the Channel.

Mr. Kirlin: That is all.

The Court: Any questions?

Mr. Laroeque: No questions.

Mr. Kirlin: If your Honor please, since the stipulation was filed yesterday, two additional numbers have been added to it, by agreement; one with a view of getting over this newspaper controversy; and the other reserving the right to

challenge any of the facts as to their materiality or relevancy. The two articles which, in the stipulation, are to be numbered 191 and 192 respectively, read as follows:

"191. The sailing of the *Kronprinzessin Cecilie* with a large amount of gold bullion was contemporaneously published in the leading newspapers of America and Eu- 1234
rope."

"192. This stipulation is without prejudice to the right of any party to challenge the materiality or relevancy of any of the facts stipulated."

Mr. Larocque: And that relates to the whole stipulation.

Mr. Kirlin: We offer in evidence the answers to the interrogatories, by the claimant, in the 1235
Guaranty Trust Company case and the Rantoul case, and ask that the answers in the Rantoul case, which are fuller somewhat than the others, may be considered as evidence in our two cases and also in the Hanssens case.

The Court: There is no objection, I suppose?

Mr. Noyes: No.

Mr. Hickox: With respect to the Hanssens case, we agreed with counsel that they should not 1236
be required to duplicate physically the answers to the interrogatories in the Rantoul case.

The Court: The answers, then, may be part of the record.

Mr. Blodgett: Now, in reference to the case of The National City Bank, Mr. Larocque, in that case, filed an answer to our original libel. We made an amendment to our libel, making a few minor changes and adding some interrogatories.

1237 *Stipulation of Facts.*

He filed a short answer, setting up that he desired to have the original answer applied as an answer to the amended libel, which is satisfactory to us, of course, and will save some duplicating of papers.

Statement of Mr. Blodgett on behalf of the National City Bank of New York, with respect
1238 to Stipulation:

In addition to the stipulations which have been entered into in the Guaranty Trust Company case, and which, as I understand, apply to our case so far as they are competent and material, also—we have these specific stipulations, which I will read into the record.

The Court: A stipulation.

Mr. Blodgett: Yes, this is an added stipulation
1239 for The National City Bank case only.

The Court: Relating to that case only—to No. 1076 only?

Mr. Blodgett: Yes. (Reading.)

"IT IS HEREBY STIPULALTED AND AGREED, by and between the parties hereto, as follows:

I.—The libelant, The National City Bank of New York, is a corporation organized and existing under the laws of the United States,
1240 having its principal office in the City and State of New York.

II.—The claimant, North German Lloyd, is a corporation organized under the laws of the Free and Hanseatic City of Bremen, and existing under said laws and the laws of the German Empire, and is and at all material times was the owner of the *Kronprinzessin Cecilie*.

III.—On July 27, 1914, The National City Bank of New York shipped, in good order and condition, on board the Steamship *Kronprinzessin Cecilie at New York*, 21 kegs containing gold bars owned by said shipper, of the value, at the time and place of shipment, of $1,061,718.89, to be carried by said steamship from the port of New York to the port of 1242
Plymouth, England, and thence to be forwarded at steamer's expense but at owner's risk to London, England, and delivered to London City & Midland Bank, Limited, or to its assigns for the account of the said shipper and owner; and prepaid the agreed freight thereon at the rate of three-sixteenths of one per cent. of the said actual value so declared, amounting to $1,990.72; and a bill of lading covering the said shipment of gold, 1243
dated July 27, 1914, was thereupon delivered to and accepted by the said Bank as the contract of carriage covering the shipment in question. A true copy of the said bill of lading is annexed to the claimant's answer to the libel of The National City Bank of New York, marked Exhibit A.

IV.—On July 27th, 1914, The National City Bank of New York shipped, in good or- 1244
der and condition, on board the Steamship *Kronprinzessin Cecilie* at New York, forty kegs also containing gold bars owned by said shipper, of the value, at the time and place of shipment, of $2,104,254.34, to be carried by said steamship from the port of New York to the port of Cherbourg, France, and thence to be forwarded at steamer's expense but at

owner's risk to Paris, France, and delivered to Credit Lyonnais, or to its assigns, for the account of the said shipper and owner, and prepaid the agreed freight thereon, at the rate of one-eighth of one per cent. of the said actual value so declared, amounting to $2,630.32; and a bill of lading covering the said shipment of gold, dated July 27, 1914, was thereupon delivered to and accepted by the said Bank as the contract of carriage covering the shipment in question. A true copy of said bill of lading is annexed to claimant's answer to the libel of The National City Bank of New York herein, marked Exhibit C.

V.—No statement written or oral was made by or on behalf of the libelant to the claimant or its agents of the purpose for which either of said shipments was made, otherwise than as stated in said bills of lading, or of the disposition which it intended to make of any of said gold, and no notice of any special damages which would or might result from a failure on the part of said steamship or of the claimant to perform said contract. But under this stipulation the question of constructive notice is left open."

Mr. Beck: Pardon me just one moment, as to that matter of "constructive notice."

Mr. Kirlin: As to that matter of "constructive notice," my understanding of what we meant by "constructive notice" is "knowledge from circumstances."

Mr. Noyes: That is exactly what we understand.

Mr. Beck: The point is simply this: We have 1249
a stipulation that "No statement, written or oral" was given by the libelants to the claimant as to the purpose for which these shipments were made, but that it is open to us to charge them with "constructive notice." Now I have just called the attention of my friends to the fact that "constructive notice" is a legal phrase, and it is left open to us to prove "constructive notice," or "actual knowledge." 1250

The Court: "Constructive notice" may mean one thing or another. Why don't you say "actual knowledge"?

Mr. Kirlin: "Knowledge from circumstances."

Mr. Beck: But "constructive notice" I think fairly refers to an irresistible legal inference, whereas "actual knowledge" is a question of fact.

The Court: I do not quite agree with that.

Mr. Kirlin: Instead of "constructive notice," 1251
—"knowledge from circumstances."

The Court: From any competent evidence.

Mr. Kirlin: That is what I understood, and that is what I think we all understood at the time.

Mr. Noyes: If the Court please, this stipulation was drawn with very great care. We prepared it and have handed it back and forth and have discussed it at length. We intended, and it was fully understood that it was agreed, that no 1252
statements were made as to the purposes for which this gold was shipped, and that there was no notice of any special damage, but that we left open the question of constructive notice.

The Court: That is, of knowledge to be gathered in any way.

1253 Mr. Noyes: That is what "constructive notice" is.

The Court: Yes.

Mr. Noyes: Now, to change the language here at this last moment——

The Court: I do not think you need to change the language, and I do not think you need to quarrel about it. I know what you mean, whether you say "constructive notice" or whether you say
1254 "actual knowledge, shown by any competent testimony."

Mr. Beck: As long as it is understood that we may prove, by testimony, other than a written or oral statement, that there was actual knowledge on the part of the North German Lloyd as to the conditions of the markets of the world, why——

Mr. Noyes: That is what I call "constructive notice."

Mr. Beck: All right. I may be too metaphysi-
1255 cal, but I did not so regard it.

Mr. Blodgett: It is further agreed:

"On the 17th day of November, 1914, the claimant, without admitting liability, refunded to The National City Bank of New York the sum of $331.79, which it claimed to be the proportion of the prepaid freight covering the inland transportation of said bank's gold from Plymouth to London, and the sum of
1256 $657.58, which it claimed was the proportion of the prepaid freight covering the inland transportation of said bank's gold from Cherbourg to Paris, the acceptance of said refund by the said bank being without prejudice to its claim against said steamship and her owners for their alleged failure to de-

liver said shipments of gold in accordance 1257
with the terms of the contracts.'

"The Steamship *Carmania* of the Cunard Line sailed from the Port of New York under the English flag on Wenesday, July 29, 1914, at about 3 P. M., for Queenstown, Ireland, and Liverpool, England, carrying mails and cargo, which said steamer arrived in Liverpool, England, on Thursday, August 6, 1914.

"The Steamship *La Savoie* of the French 1258
Line sailed from the Port of New York, under the French flag, on Wednesday, July 29, 1914, at about 10 A. M., bound for Havre, France, carrying mails and cargo, which said steamer arrived in Havre, on August 6, 1914.

"Each of these ships had available space to accept the shipment of gold in question, but it is not admitted by Claimant that The National City Bank of New York or the 1259
Guaranty Trust Company would have desired to or would in fact have shipped the gold by either of said ships.

"It is further agreed, subject to correction, that both of said ships were subsequently taken over by their respective Governments as auxiliary cruisers."

The Court: Is that all? 1260
Mr. Blodgett: Yes.

"It is agreed that all matters stated in any stipulation and all evidence interrogatories, answers and proceedings shall apply, so far as applicable, to all the cases."

Mr. Blodgett: We may either of us, of course,

1261 if it ever becomes desirable later to make up separate records, have the separate records made up. Now, in view of your Honor's suggestion that it is not necessary to offer formally the answers to the interrogatories in our case, I will not do so. I understand they are in evidence. That is everything that we have. If there is anything further——

The Court: Do you mean to say that the libel-
1262 ants rest here, or that you have further evidence to put in by deposition?

Mr. Blodgett: Practically, we rest; but if, on going over it after it is written out, there seems to be anything that either of us have overlooked or forgotten, why, we both want the right to get it.

The Court: Neither party had better rest. You had better regard your cases as kept open, only have it informally understood that whatever proofs further you desire to put in you can put
1263 in by deposition.

Mr. Kirlin: Yes.

Mr. Noyes: If your Honor please, we had not wholly finished putting in the testimony that we had. We wish to read some sections of the German law.

Mr. Larocque: The stipulation covers this and permits a translation to be offered.

Mr. Kirlin: We wish to make record of the
1264 fact that we object to the German law as entirely immaterial and irrelevant and incompetent in this case.

The Court: What you propose to offer, if it should be found material, is the matter of the German law touching certain matters, as follows?

Mr. Larocque: This is set up in our answer. The defence is to the effect that, not only under

our own law, but under the German law, under 1265
whose flag the ship was sailing, the ship was absolved for putting back to New York; that is, that we were justified, both according to the law of the flag, and according to the law of the forum.

The Articles to which I refer, are as follows:

This is Article 634 of "The Maritime Code of the German Empire":

"§634. When, subsequent to the commencement of the voyage, any of the inci- 1266
dents occur to which reference is made in Art. 629, either party has a right to withdraw from the contract without being liable to damages."

Article 629, to which reference is made in Article 634, reads as follows:

"Either party can withdraw from the contract without being liable for damages—— 1267
(1)——"

I will omit that, because it has no reference to the present situation. It is open for inspection by counsel.

"(2.) When, before the commencement of the voyage, a war has been declared in consequence of which the vessel, or the goods to be shipped according to the contract of af- 1268
freightment, or both, can no longer be considered free, and would be liable to risk of capture.

"The exercise of the right granted to the charterer in Art. 562 is not excluded by these prescriptions."

"Art. 669. The passenger may withdraw

1269 from the passage contract, when, in consequence of a war breaking out, the vessel cannot any longer be considered as free, and would be exposed to the risk of capture, or if the ship's voyage should be delayed by a Government order.

"The ship owner has likewise the right of withdrawal when, in either of the above cases, he gives up the voyage, or when the
1270 vessel is intended principally for the transport of goods, and the adventure cannot be undertaken, because, without any fault on his part, such goods cannot be forwarded.

"Art. 670. In all cases in which pursuant to Arts. 668 and 669 the passage contract is dissolved, neither party is liable to damages."

And by way of parenthesis, I would add that
1271 Article 668 merely provides that, "The passage contract becomes null and void when the vessel is lost in consequence of a casualty." Now, continuing Article 670:

"When, however, such dissolution takes place after the commencement of the voyage, the passenger shall pay passage money in proportion of the performed part of the voyage to the whole.

1272 "In calculating the amount due, the prescriptions of Art. 631 are decisive."

Article 631, to which reference is made in Article 670, reads as follows:

"In the calculation of the distance freight it is to be taken into consideration not only the proportionate distance already performed

to that still to be completed, but likewise the comparative proportion of expenditure in cost, time, danger and labour ordinarily connected with the part of the voyage already performed to that still to be completed." 1273

Now, Article 629 referred to Article 562. And I may add here, by way of parenthesis, that Article 562 would apparently have no application to this case. It refers to the right of the charterer to tender other goods when he is unable to ship, or where the ship is unable to accept, the particular goods which were contracted for. 1274

Mr. Beck: I assume these will be read into the record subject to verification of the accuracy of the translation; and also with the additional and important facit that counsel for the libelants may have permission to read into the record any other portions of the same book which seem to them pertinent. We have never seen this book at all; 1275 and it may be that the chapter heading, or some other feature, would materially affect any possible force of it. We have already objected to it. I would like to look at the book.

Mr. Larocque: Certainly.

Mr. Noyes: Is there any objection to using the book?

Mr. Beck: Not at all. It is simply the fact that if there was some technical phrase—— 1276

Mr. Larocque: The stipulation covers that, "subject to correction."

Mr. Beck: But we want permission to read in any other portion of it after we have had an opportunity to examine it.

The Court: Is Mr. Larocque translating this?

Mr. Larocque: I am sorry that I cannot trans-

1277 late as well as that. This is a translation, which I am reading.

Mr. Kirlin: Does your Honor grant us that leave?

The Court: I should think that was right. Of course, that must be done before the record is made up. You should not thrust into the record some unknown, uncontemplated Articles.

Mr. Kirlin: No, we will put in, when we are
1278 putting in our remaining evidence, anything we may wish to in connection with this.

Mr. Larocque: For the purpose of identification, I wish to state that I was reading from the translation by W. Arnold, published by Effingham Wilson, 11 Royal Exchange, E. C., London, 1900.

The Court: And the book is submitted to counsel on the other side for examination with the understanding that if they desire to put in anything from the book and make it a part of the
1279 record, it can be done.

Mr. Noyes: When the libelants were putting in their *prima facie* case, they stated they would not offer any proof as to damages, but that that matter would be a subject of deposition to be taken later in New York. Now, in order to obviate that, and in order to avoid complicating the issue here, and in order that your Honor may be able to decide this clear question of law, we have entered
1280 into the following stipulation, which I will read and ask the reporter to take:

> "It is agreed by the claimant that by reason of the non-delivery of the gold in Europe the Guaranty Trust Company and The National City Bank have been put to certain items of expense which establish a *prima facie* case for more than nominal damages in

case the Court find any liability on the part 1281
of the ship. It is agreed by the parties that the foregoing agreement shall in no way preclude the claimant from contesting said claims as well as all other claims for damages in respect of principle, basis and amount: it being understood that the foregoing agreement by the claimant is made solely for the purpose of relieving said libelants from the obligation to call at the present time witnesses to 1282
establish a *prima facie* case of some substantial damage in case of liability, and leaves open all other questions regarding damages for later consideration and determination should the occasion arise."

Mr. Kirlin: That is sufficient for our *prima facie* case, I take it.

The Court: Yes.

Mr. Noyes: Now, if your Honor please, as I 1283
understand the case is to be kept open for Mr. Hanssens' testimony and for other testimony that might be offered, what I am now going to say might be unnecessary; but still, to avoid any misapprehension, I will say it. This case has been brought to an issue quite rapidly. In January or February the proctors for the claimant wrote to Bremen for certain information as to various matters, and we have received word that that letter had been received, and they were making an 1284
investigation, and that we would hear shortly. Now, it may be that if we shall receive that within a reasonable time, and before this matter is closed, there may be some matters which we shall think it necessary to offer other evidence upon. And I merely wish to reserve that right.

1285 The Court: You do not have to reserve it. It is understood that neither side rests.

Mr. Noyes: There is only one further thing I wish to say, which I think closes the matter at this time. That is that, while, of course, this is an extraordinary case, it is, still, a suit in admiralty against a ship; and I understand that it is the custom, where only the master is called, to ask that that should not be regarded as prejudicial. We did not call other witnesses from the ship, be-
1286 cause it seems to be a case where the facts were all covered by stipulation and where Captain Polack's testimony was quite sufficient. I bring up the matter so that our failure to call other witnesses should not be regarded as prejudicial to our case. That finishes the case for to-day so far as we are concerned.

Mr. Larocque: We understand that the other side agree to that,—that there shall be no pre-
1287 sumption raised by our failure to call other witnesses?

Mr. Kirlin: We claim no presumption.

The Court: The understanding I think was, that we should try to get the case for hearing and for decision in this court so that you could, before the summer time, get it to the Court of Appeals. I do not know whether you will be able to do that.

Mr. Kirlin: We do not wish you to feel at all
1288 hurried by any consideration of a further step in the case. We would very much prefer that your Honor would take whatever time is necessary to give it your fullest and most completely considered judgment first.

The Court: By the consent of everybody, and tentatively, I will fix the 5th day of May, which is Wednesday, at 10 o'clock, for the time of the hear-

ing. I won't undertake to make any order, as I 1289
say. You are all, practically, in New York, and you can accommodate each other by passing your briefs back and forth. I will make an order, if you desire, and have it understood, that at a convenient time before the hearing you will pass your briefs back and forth, and give a chance for each to reply. Is that satisfactory?

Mr. Noyes: Yes.

The Court: And Mr. Kirlin and Mr. Beck? 1290

Mr. Kirlin: Yes, your Honor.

The Court: Then I will leave it that way. You are all so experienced in admiralty matters that I won't undertake to tie you down.

Mr. Kirlin: We will endeavor to do the best we can with it.

The Court: The clerk asks me to instruct him as to the docket entry. I think you may make this docket entry:

"Further proofs to be taken by deposition. 1291
Cases continued to be argued Wednesday, May 5, at 10 o'clock in the forenoon."

Mr. Noyes: Do you wish to say anything about its being tentative?

The Court: I won't say that on the docket,—that it is fixed tentatively; but it is understood by counsel. And it is understood in this way, that if you talk it over with each other, and if you 1292
find you have got to have some more time, you can have it. I want to say, in regard to my own engagements, that the very last of May I shall be held pretty closely; and in June,—the first of June, I have a trial at Bangor; so if I am to hear it in May, I shall be compelled to hear it during the week of May 5th or not more than ten days

1293 afterwards. I say that so that when you are making your engagements you will know what my engagements are. I should try to get a day almost any time by agreement of counsel; but I should not be sure of anything after ten days or so later than the 5th of May.

Mr. Blodgett: I presume it will take more than one day your Honor.

The Court: Oh, yes. If I assign it for the 5th,
1294 I understand you would probably require two days. Now, is there anything else that counsel think of?

Mr. Beck: I think nothing but to thank your Honor for the great patience with which you have heard us.

The Court: I also have to thank counsel.

Mr. Beck: We have tried to agree upon everything except the final decree; and we thought your Honor would take care of that.

1295 The Court: It has been a very agreeable case and a very interesting case.

[Adjourned to 10 A. M., May 5, 1915.]

1296

UNITED STATES DISTRICT COURT, 1297

DISTRICT OF MASSACHUSETTS.

MAURICE HANSSENS,
Libelant,

AGAINST

THE STEAMSHIP KRONPRINZESSIN CECILIE. 1298

Deposition of MAURICE HANSSENS, libelant, taken in his own behalf, before Edward H. Carpenter, Notary Public, at the office of Messrs. Convers & Kirlin, No. 27 William Street, New York, April 20, 1915.

New York, April 20, 1915. 1299
3 o'clock P. M.

Present:—

Messrs. CONVERS & KIRLIN (MR. HICKOX) for libelant.
JOSEPH LAROCQUE, ESQ.,
WALTER C. NOYES, ESQ.,
JOSEPH B. BEDLE, ESQ., for claimant.

It is stipulated that the testimony may be taken 1300
by a stenographer, his fees to be taxable; signing, certification and filing waived; seven copies to be furnished; half stenographer's fees to be paid by libelant and half by claimant.

MAURICE HANSSENS, libelant, called in his own behalf, being duly sworn, testifies:

Direct Examination by Mr. Hickox:

Q. You are the libelant in this case? A. Yes.

Q. Did you sail with Mrs. Hanssens on the *Kronprinzessin Cecile* last July? A. Yes.

Q. When did you go on board? A. I went
1302 aboard the 27th of July, 1914, in the evening; and I sailed the 28th, I think, at 1 o'clock.

Q. For what port had you taken passage? A. I took passage for London. I had a ticket around the world; and that ticket had been delivered to me in San Francisco in exchange for the ticket I had for around the world.

Q. What did you pay for the tickets for yourself and your wife? A. $265.

1303 Q. Where was the ticket actually delivered to you? A. I think it was in San Francisco. But I ordered that ticket in Yokohama—in Hongkong or Shanghai, and then they wrote in San Francisco that the ticket was ready when I came to San Francisco.

Q. When you got the ticket did you make any examination of the printed clauses on it?

Mr. Larocque: Objected to as incompe-
1304 tent, irrelevant and immaterial.

A. No, I did not. I took the ticket immediately, because I didn't stay a long time there, you know. I never read the little writings.

Mr. Larocque: The answer of the witness is not responsive—the statement of his reasons for not looking at it.

1305

Q. Did you ever read the printed clauses on it? A. No.

Mr. Larocque: Objected to on the same grounds—and also this whole line of examination.

Q. Do you know now what is contained on the ticket?

1306

Mr. Laroque: Same objection.

A. I have not the slightest idea of that.

Q. And did you ever have? A. No. That ticket, I didn't read it. I wanted to see if my passage was good, that was all.

Q. What was the first that you knew about the turning back of the steamship? A. It was only when one of the stewards told me the steamer was going around back to New York. I would not believe it. And then I saw the moon. I was playing bridge on the upper deck in the saloon there; and I would not believe it and laughed at the steward; and he was cross because I would not believe him, and he said, "Go and see outside." I went outside; and the boat was turning. I didn't know it only then.

1307

Q. Did they take your ticket on the steamer? A. I think so; I think it was on the steamer, yes; but I couldn't state exactly because it is so long.

1308

Q. When you got to Bar Harbor what did they do—the steamship people? A. They first promised us a ticket to New York, but they didn't give it to us. There were several trains starting, and I bought my ticket in Bar Harbor; but they gave me back the money here in New York—the North German Lloyd; they gave me back for the

railway ticket and sleeping car—they gave me that money back in New York.

Q. When did they do that? A. I think 8 days after I came back; I couldn't tell exactly the date, but it must have been the end of the first week, I think; I don't know exactly.

Q. What did they do about your luggage? A.
1310 My luggage? There was great disorder; and all those pieces of luggage were in that small, little harbor, and then the train was in the place when we were there—that was another little place where we were transferred by boat, and we found a lot of luggage at the railroad depot, and we had only a few minutes to embark; and I took all my luggage very quick (myself and a porter) and put it in the train; but I didn't find my largest trunk with it.

1311 Mr. Larocque: Are you making any claim for damages for loss of luggage?

Mr. Hickox: I don't think for loss of luggage.

Mr. Larocque: Any damage to luggage?

Mr. Hickox: I am trying to get the story.

Mr. Larocque: Then that is objected to as not pleaded.

1312 Q. Continued. A. I started out of the harbor with a piece of luggage less. Then I went to Cook's, and I said I was insured against loss of luggage, and I said immediately I lost my trunk; and they made a search; and I received the trunk 4 or 5 days afterwards.

Q. You finally got all your luggage, did you? A. Finally I had all my luggage.

Q. Do you remember just what day it was that your luggage was delivered to you in New York? A. I couldn't say exactly, but I think it was Tuesday; Monday or Tuesday; I didn't take notice of that. 1313

Q. Did you endeavor to secure other passage? A. Yes, immediately. I wired from——

Q. What were you able to do? A. I wired from Bar Harbor to have immediate passage; but when I came to New York I hadn't all my luggage, and I cancelled that engagement because I couldn't go. My largest trunk was behind; it didn't come. And then they canceled that engagement; and I only got another ticket—because it was very difficult for Cook to have another one, they sent several times to the North German Lloyd—— 1314

Mr. Larocque: I object to any conversation with Cook. 1315

Witness—I only say what happened; I can't say otherwise. Cook said, "It would be very difficult now; I am going to try to have you another ticket." Then he gave me a ticket of the White Star Line for the 20th of August. That ticket I have here. I showed you that ticket for the 20th of August. That was the first ticket I had; and I couldn't start the 20th of August, because my wife was not well at all. 1316

Q. Before you sailed from New York where had you been staying? In what hotel? A. In the Plaza.

Q. How long had you been there? A. 3 days.

Q. When you came back to New York where did you go? A. Oh, I went for some days to the Brevoort Hotel, because it was cheaper; and

1317 then I found it too expensive again, and I went to a private boarding house.

Q. As a result of the failure of the *Kronprinzessen Cecilie* to deliver you at Plymouth have you sustained any financial loss?

Mr. Larocque: Objected to as calling for a conclusion.

1318 A. Certainly.

Q. Will you state what it was? A. Well, I had to pay all my hotel here in New York; and, then, I had no money; I couldn't get money from Belgium—I have been deprived of all my income.

Q. What business positions do you hold in Belgium? A. Well, I am director of a flour mill, and director of another company making laces and gloves and brushes and passementerie.

1319 Q. What are the names of those companies? A. Societe Anonyme des Moulins de Trois Fontaines à Vilvord. Then another one is Societe Anonyme Hanssens Hap à Vilvord.

Q. What is your income from your business connection when you are at your business?

Mr. Larocque: Objected to as incompetent, irrelevant and immaterial and as too remote.

1320 A. That business is the benefits of the year. But it must go between 20,000 and 25,000 francs. That is approximately $4,000 or $5,000.

Q. When you are not there do you earn any of that? A. I don't think; I know. Because they can't pay me if I don't work. I had a holiday going away, but my holiday was finished.

Q. Where was your home? A. In Brussels.

1321

Q. In addition to this loss of compensation that you have spoken of for your time, did you lose anything else? A. In addition to loss of time?

Q. Yes. A. I don't know exactly what you mean.

Q. Did you lose any property? A. I don't know. I don't know if I lost some property. I must go in Belgium to see that. I have no news from Belgium. I can't say that before the end of the war—before the Germans have got out of Belgium.

1322

Q. What was the extent of your property in Belgium? A. Around 750,000 francs. But, then, I had also some jewels and furniture and all that. It would be around $200,000, I think; something like that; it all depends on the exchange.

1323

Q. What was the nature of the property? A. My property? I have houses, lands, shares, bonds, and jewels, pictures, furniture.

Q. Do you know the meaning of the words "personal property"? A. Oh, well, all right. You see exactly it must be between 700,000 and 750,000 francs not real estate, and then the rest is real estate.

Q. And whether that is still there or not you don't know? A. I don't know. Real estate, certainly, if they don't demolish my houses in Brussels afterwards; but, from news I received, they didn't do anything—they didn't do anything to the real estate.

1324

Q. Have you had any word from Brussels about your affairs? A. Yes, from one of the affairs? The flour mill is running. But the other I don't know—I have no news.

1325 Q. At New York, after you got back from Bar Harbor, what expenses were you put to? A. In New York?

Q. Yes. A. I had my living down here. I did as economically as possible, because I hadn't much money; and, as I say, I went first to the Hotel Brevoort, where I paid—I must have it here (witness looking in his pocket).

1326 Q. (Paper shown witness.) You mean this memorandum? A. Yes. I paid in the Hotel Brevoort for 4 days $50—my wife and myself. And then the transportation of my luggage to the Brevoort, from the boat, and paid from the Brevoort to my private boarding house $6.00; and then I stayed for 11 days to the 20th of August only, 11 days, in that private boarding house; I had it very cheap for $40. Then I

1327 bought some clothes. But generally my wife did dress herself and did her laundry herself (we were very tight); and I paid between $150 and $200.

Mr. Larocque: During what period?

Mr. Hickox: Until the 20th of August.

Witness: Yes. You see I sent directly from Yokohama—the last part of the luggage—di-

1328 rectly to Belgium, because I went through the United States; I was going back, and then I sent a part of my luggage back to Belgium. So I hadn't enough in New York.

Q. Did you suffer any mental anxiety or inconvenience?

Mr. Larocque: Objected to as incompetent, irrelevant and immaterial and too remote.

1329

A. You must understand that, because I was here quite a stranger. I knew nobody in New York. I had not nearly enough money. Fortunately I went to my Consul, and he was very kind to me and lent me a little money, enough to live very, very quietly. But it was very painful to me to have that money because I never did so before; I had enough income to live very comfortably, and here I have been very tight, and I have been in Canada, trying to find some work to win something, until last week.

1330

Q. Are you about to go to France? A. No. I received a telegram from the general commanding the hospitals, and he said to me to come and to help him, to be secretary of those field hospitals, and I am sailing tomorrow.

Q. To what port? A. I am going now to Liverpool, and to London afterwards, and I am waiting orders in London.

1331

Q. Did you try to get back the passage money that you had paid for your ticket?

Mr. Larocque: Which ticket?

Q. The ticket of the *Kronprinzessin Cecilie?* A. No. They would not give the money back.

Q. Did you try to get it back? A. Yes.

1332

Q. Did you ask them for it? A. Yes. But they said, "No. We will give you another ticket." And the ticket I didn't have from the *Nord-Deutsche*, but Cook gave me that. That ticket they gave me back, I went with that ticket to Cook's, and Cook gave me in exchange a ticket of the White Star Line.

Q. You mean that the North German Lloyd gave you back the ticket that you had on the *Kronprinzessin Cecilie?* A. Yes.

1333 Q. And you took that to Cook's? A. Yes.

Q. And got from them the ticket on the White Star Line? A. On the White Star Line.

Q. For the 20th of August? A. Yes.

Q. Is that it? A. Yes. The only money I had en route was the money for transportation from Bar Harbor to New York.

1334 Q. Did the North German Lloyd decline to give you the money on your ticket? A. Yes. I asked it, and they didn't give me the money.

Q. When in ordinary course would you have got to Belgium if the *Kronprinzessin Cecilie* had completed her voyage and discharged you at Plymouth? A. I was intending to go directly to Brussels. I think the *Kronprinzessin Cecilie* would be there the 2nd of August.

1335 Mr. Larocque: Objected to as calling for a pure conclusion of the witness and incompetent.

Witness: I would have gone directly to London, and then to Ostend, and then from Ostend to Brussels, and I would be in Brussels between the 3rd and 4th of August.

Cross Examination by Mr. Larocque:

1336 Q. Mr. Hanssens, I understand that after you returned to New York the North German Lloyd gave you the ticket which you had bought from the North German Lloyd and which you had surrendered on the steamer? A. Well, that is not so. I didn't buy that ticket from the Nord-Deutsche.

Question repeated. A. Yes.

Q. (Paper shown witness.) I hand you a

1337

ticket. Will you look at that and tell me whether that is the ticket?—There is blue pencil mark (Counsel indicating). A. There was nothing of that on that ticket when I had it.

Q. The blue pencil mark is new.—You never saw that before? A. No.

Q. That is on the face of the ticket? A. Yes.

Q. But it is the same ticket—the ticket itself? 1338
A. My name is on it; if they copied another ticket I couldn't say; I suppose it is.

Mr. Larocque: I offer that in evidence.

Mr. Hickox: I object to it as not being properly proven.

Ticket marked claimant's exhibit A of April 20, 1915.

Mr. Larocque: That is offered with the exception of the blue pencil marks on the face, which are not part of the 1339
ticket.

Witness: I think that is the ticket. It is very difficult to say.

Q. On the back of the ticket, under the words "Names of Passengers," appear in writing the words "Mr. and Mrs. Maurice Hanssens." A. That is not my writing.

Q. That is not your writing? A. No. 1340

Q. When this ticket, claimant's exhibit A of this date, was returned to you at New York you took that to Cook's Ticket Agency? A. Yes.

Q. And Cook obtained for you a ticket on some other steamer? A. No. First I wired to Cook from Bar Harbor "take passage on some boat"—I couldn't tell exactly the terms of my telegram. I was in a hurry to go back, and I wired from Bar Harbor "take a ticket on a

neutral boat." I came here to New York, and Cook gave me passage on the Red Star Line boat, a neutral boat, and it was sailing the following day, in the morning. But I said, "I can't take that boat, because I have not all my luggage and I want to have my trunk."

Q. Now, Mr. Hanssens, I want you to listen to my question. I have not asked you a word
1342 about any conversation you had with Cook. I asked you whether you took this ticket to Cook's. A. Yes, when I had it back. But I hadn't it back immediately, because—

Q. Will you listen to the question? A. Yes, I understood your question.

Q. My question is: after you returned to New York, sometime after you returned to New York? A. Certainly I had the ticket; but Cook gave me
1343 a ticket on the Red Star Line before I had this ticket.

Q. What did you do with this ticket, claimant's exhibit A, after it had been returned to you by the North German Lloyd at New York? A. When I went to the North German Lloyd's office some days afterwards they gave me my passage, as I said just now—my passage from Bar Harbor to New York—with that ticket; and I asked for the money, and they said no. I answered that ques-
1344 tion. I answered that before.

Q. You have not yet answered the question. A. Oh, yes, I think so.

Question repeated. A. I went with that ticket to Cook's.

Q. Did you surrender this ticket to Cook? A. Yes, to Cook.

Q. And did Cook obtain for you a ticket on

1345

some other steamer? A. Yes, but not immediately. He had a lot of difficulty.

Q. If you will kindly listen to my question you will know I did not ask you anything about the difficulty which Cook had, but whether Cook obtained a ticket for you on some other steamer? A. Yes.

Q. What other steamer was that? A. On a steamer of the White Star Line. 1346

Q. What steamer? A. It was written on the ticket. I think it was the *Celtic;* I think; I don't remember.

Q. Have you that ticket now? A. Yes, I have always that same ticket.

Mr. Larocque: I demand the production of that ticket.

Mr. Hickox: As the witness has said that he is about to use the ticket for passage tomorrow, I think it is impossible for us to give it to you. 1347

Witness: You have only to refer to the White Star Line; they will tell you.

Q. You did not make any payment to the White Star Line or to Cook for that ticket? A. No.

Q. So that ticket was given to you as a substitute for this ticket in the North German Lloyd on the *Kronprinzessin Cecile?* A. I couldn't say that, because I had nothing to do with the Nord-Deutsche at that moment. Cook gave me the ticket on the White Star Line; that is all I know. 1348

Q. And you had not to pay for it? A. I had not to pay for it; no.

1349 *Maurice Hanssens—Cross.*

Q. Before sailing on the *Krnprinzessin Cecilie* you were in California? A. Yes.

Q. And you bought your ticket in California for the *Kronprinzessin Cecilie?* A. I gave in San Francisco a separate balance of, I think it was, $62; something like that.

Q. You had already made a payment? A. I
1350 paid in Brussels.

Q. Brussels? A. Before leaving.

Q. And this ticket, claimant's exhibit A, was delivered to you at San Francisco? A. Yes, I think certainly in San Francisco or Yokohama; I don't remember, but I think it was San Francisco.

Q. It said June 24, 1914. A. June 24th—San Francisco.

Q. So that you had it over a month in your
1351 possession? A. Yes.

Q. Mr. Hanssens, have your counsel given you copies of the Interrogatories that were annexed to our Answer to your Libel; that is, a list of the questions that were annexed to our Answer to your Libel? A. Did Mr. Hickox?

Q. Yes. Have you been shown that? A. No. When I came here I explained to you (addressing Mr. Hickox) my case; that is the only thing I did.

1352 Q. You filed what is called a Libel, that was your pleading, and the owner of the steamship filed an Answer to your Libel. Annexed to that Answer were what are called Interrogatories; that is, questions. Have you been shown those questions? Have you read them? A. They read it to me, certainly, and I answered it—what they asked me. They asked me—just like I do now.

Q. On your direct examination you stated that

you were the director of two companies? A. Yes.

Q. In Belgium? A. Yes.

Q. One of them was a flour mill? A. Yes.

Q. And the other was a manufactory of lace? A. Lace and all sorts of things like that.

Q. One of those manufactories, so far as you know, has been destroyed? A. No.

Q. One of them? A. No. 1354

Q. You don't know whether it is doing business at the present time? A. One has been doing business; but the other, I don't know.

Q. You stated that you received a salary equivalent to about $4,000 a year? A. Yes.

Q. From which one of those companies did you receive that salary? A. From both; I received from both. I expect it is between $4,000 and $5,000. Between $4,000 and $5,000. One I received between $3,000 and $4,000; and the other 1355 much less—that depends upon the benefit they do every year.

Q. You mean by that that you had a salary? A. Yes, percentage and wages; the wages are very low; only a percentage.

Q. What was your salary—fixed salary? A. Fixed salary?

Q. Yes. A. From both it is nearly $1,000, fixed; but all our works are interested in the business. 1356

Q. So that when your business is good you get more? A. Yes.

Q. And when the business is very poor you get less than when it is very good? A. It was exceedingly good. I showed a letter from my mill to Mr. Hickox we had the best year.

Mr. Noyes: Not since the war?

Witness: Till the war. After the war I know

nothing about it, because I don't receive letters. But I gave you letters of the manager, and he said it was one of the best years we had.

Q. Until the war? A. Until the war.

Q. But you don't claim that business conditions are better now since the war? A. No, I can't say anything about it; I don't receive news.

1358 Q. How do you claim that the failure of the steamship to land you at Plymouth deprived you of your business gains in that business? A. Because I was not able to work. As I told you just now, when they don't work they don't get money; and I had my holiday till the end of my round-the-world trip; my holiday was finished; and then I don't think they would pay me for something I don't do.

Q. If you had gone on the White Star liner or
1359 the Red Star liner you could have returned to your work, could you not? A. No.

Q. Why not? A. Because I could not reach Brussels.

Q. There was no way, you claim, of reaching Brussels? A. No.

Q. On the next steamer? A. I could not. I knew that, because I have some friends who have been in Belgium and have been refugees in Eng-
1360 land, and they wrote me that from the mobilizations in the beginning of the war they couldn't get motor cars, they couldn't get trains, they couldn't get anything at all.

Q. Then I understand that your friends in Belgium at the outbreak of the war are now refugees in England? A. Some of them, certainly.

Q. I assume there is no way of ascertaining at the present moment whether, if you had been in

Belgium at the outbreak of war, you would be a refugee in this country, or in England, or some other country? A. No. Because in Belgium I have nothing to fear just now. All my family are in Brussels now. 1361

Q. How far from Brussels were these factories? A. That was in Vilvord. That is about 6 miles from Brussels. It is very close. There is a street car running from Brussels to there. 1362

Q. I understood you to state you had 750,000 francs. Did you mention that number? A. Yes.

Q. 750,000 francs personal property? A. Yes; and 250,000 francs of real estate.

Q. What was that personal property? A. Those were bonds and——

Q. What bonds? A. I couldn't tell you all that.

Q. You don't know what they were? A. I know some of them; but there was a lot. Because when I went on the voyage that comes from my wife. She lost her parents six months before I went out from Belgium; and I couldn't say in detail about that, because there are some three or four pieces on one side and ten on the other, and a lot different; but I could say something about the mills of Vilvord—— 1363

Q. What are you saying? A. I said I couldn't give the data of all that because it is too numerous different amounts. 1364

Q. Then you don't know what precise kind of property it was? A. Yes, the kind of property. It was some personal property. I could say some of that, but not everything; I have not got memory to say that.

Q. There were some bonds? A. Bonds, shares, and like rents of the State and all those things.

Mr. Noyes: Leases?

1365 Q. Is that the most definite information you can give us in regard to the precise character of that personal property? A. Yes. I am ready to give you an inventory about that as quick as I am in Brussels. You can take the testimony of the American Minister in Brussels. I will get the books. That is the best I can say. At this moment I can't tell you exactly.

1366 Q. Listen to my next question. Where was this property situated? I am referring now to the bonds, stock, rents, and other personal property? A. They are in banks. They are lying in the National Bank of Belgium, in the Bank of Brussels, and Credit Lyonnais in Brussels.

Q. In Brussels? A. Yes.

Q. And so far as you know they are still lying there? A. Yes.

1367 Q. Then you are not making any claim for loss of those securities? A. The news I have from Belgium are very rare, and I couldn't say. I don't think they are lost; I think they are there still.

Q. Then you are not claiming that the steamship *Kronprinzessin Cecilie* is liable to you for the loss of that property? A. But I couldn't tell you, because I don't know whether the property is lost or not.

1368 Q. You don't? A. I can't.

Q. You have also referred to jewels and furniture. A. Yes. That is the same thing. I can say after the war. After the war I can say whether I lost them or not.

Q. And the jewels were also in the banks? A. In the banks.

Q. And the furniture was stored? A. No. In my house.

Q. In your house? A. Yes.

Q. And so far as you know they are all right? A. I think so.

Q. Where was this real estate situated that you have spoken of? A. Some in Brussels. I have houses in Brussels.

Q. Whereabouts in Brussels? What was there? A. I have one house in Brussels where I live.

Q. Give us the address. A. 16 Place Albert Leman.

Q. Is the title to that in your name or your wife's? A. My wife.

Q. Your wife? A. Yes.

Q. And this personal property that you have referred to was your wife's property and not your property? A. Both.

Q. Some of it was hers and some of it yours? A. Yes. They were all together.

Q. You are not able to state which was hers and which was yours? A. I couldn't give the data. My wife must have something like 500,000 or 550,000 francs, and I must have the rest—250,000 francs.

Q. But the title to this house stands in your wife's name? A. Yes.

Q. And what other house? A. I have one house that is my property.

Q. Where is that? A. In Brussels.

Q. Give the address. A. Rue de Commins.

Q. The title to that is in your name? A. Yes.

Q. And what other property? A. And then I have some land.

Q. Where is that? A. Vilvord.

Q. And none of that has been destroyed as far as you know? A. As far as I know, no.

1373 Q. And the pictures and furniture are in these houses? A. In one house.

Q. In one house? A. Yes.

Q. In the house in which you live? A. Yes.

Q. And they are still intact as far as you know? A. I say I suppose. I can't answer further than that.

1374 Q. On your direct examination you have testified as to your living expenses here in New York after your return. You always have to pay your living expense, do you not? A. What?

Q. You always have to pay your living expenses wherever you are living? A. I suppose so, yes. But I don't want to ask money from strangers.

Q. But if you had not been living here in New York you would have been paying your living
1375 expenses elsewhere? A. Yes. And perhaps much more in New York! Because in New York I have been deprived of all comforts and all that, because I was living with much economy.

Q. Living expenses in Belgium since the outbreak of the war have been pretty high, as far as you know, haven't they? A. Not compared with here in New York. Because in Belgium we count with francs, and in New York in dollars. I have been all around the world, and
1376 have not seen a country where expenses were so high as in the United States—five times in the United States than on the other side. Living expenses in Belgium are not high.

Q. Is it your understanding that living expenses at the present time are not inflated? A. I don't know.

Q. So you are not professing to be able to compare living expenses in New York since the

1377

outbreak of the war and what they were in Belgium? A. No, not since the war. I don't know. Since the war I can't answer that.

Q. Mr. Hanssens, are you a member of any military organization in Belgium? A. No.

Q. Or are you subject to military service when you come there? A. No.

Q. Mr. Hanssens, do you claim to have given any written notice to the North German Lloyd of your claim after your arrival in this country? A. My claim after arriving in this country? I can't understand you. 1378

Q. You have made a claim against the steamship *Kronprinzessin Cecilie?* A. Yes.

Q. After your return to this country did you at any time give written notice of your claim to the agent or steamship owner? A. I gave my claim to Mr. Hickox. He is my representative. 1379

Q. But you made no claim directly to the steamship company or their agents or broker? A. My representative did, I suppose. I don't know. I had no—

Q. I say you yourself directly made no such claim in writing to the steamship? A. No, I didn't do it in writing.

Q. But you placed your claim in the hands of your lawyers? A. Yes.

Q. And when did you do that? A. I don't remember the date. I don't remember that. I don't exactly remember when I came here. I couldn't remember the dates. 1380

Mr. Larocque: May I ask now when it was that Mr. Hanssens put his claim in the hands of Messrs. Convers & Kirlin?

Mr. Hickox: I can't tell you this.

1381 Mr. Larocque: Can't you give me the date of your retainer?

Mr. Hickox: No, I cannot.

Mr. Noyes: Do you claim to have given written notice to the company within ten days after the voyage was broken up?

Mr. Hickox: We do not claim to have given
1382 any notice within ten days after Mr. Hanssens was landed at Bar Harbor.

May 27, 1915.

It is hereby stipulated that the persons hereinafter named, directors or officials of the North German Lloyd at Bremen, if called as witnesses on behalf of the claimant in the above entitled
1383 cases, would testify as follows; but nothing herein contained shall be deemed to be an admission of the truth of such testimony, and the libelant objects on the ground of immateriality, irrelevancy and incompetancy.

1. Dr. Greve and M. Walter, Directors.

Q. When was the Steamship *Kronprinzessin Cecilie* built? What was her original cost? Who was her builder? Making allowance for depre-
1384 ciation, what is the value at which she now stands on your books?

A. The Express Steamer *Kronprinzessin Cecilie* was built for our account in the years 1905-1907, by the corporation Bulken, Stettin. The price of construction amounted to Marks 15,530,000.

We would prefer not to make public the pres-

ent value of the vessel, which need not be identical with the actual value of the vessel, as this is a purely internal matter of our own, and our interests would be endangered by a publication of the desired figures. 1385

However, insofar as the progress of the litigation may require, or make desirable the submitting of the book value, the explanation to the Court in regard hereto may suffice that an annual depreciation of 5% of the purchase price is, in general, customary with us. From which the Court would then be able to ascertain without further difficulty the present approximate book value of the vessel. 1386

2. A. Petzet, M. Walter, C. Stapelfeldt, Baron von Plettenberg Mehrum, Directors; Captain Bartling, Manager Nautical Department; G. Bock, Manager Registration Department. 1387

Q. On the trial of these cases, we wish to prove that the recall of the Steamship *Kronprinzessin Cecelie* was the exercise of a reasonable discretion and judgment. It will, therefore, be necessary to show in detail what facts were known to the directors, when they sent out the wireless message.

Please state what these facts were, and when they were brought to the attention of the Managing Directors, giving in detail, so far as possible, each fact which was considered by them in arriving at their decision. Also the name or names of the directors who can testify to these facts. 1388

A. In reply to the question submitted here, the following contains a description of the progress of events, as they resulted in the sending of our telegram of July 31st, 1914:

1389 *Stipulation.*

Up to Wednesday, July 29th, the interpretation of the political situation, which, of course, was followed by us with the greatest attention, from the time of the ultimatum sent by Austria to Servia, and the conflict of interests resulting therefrom, between the powers interested directly or by alliance was essentially a quiet and optimistic one, on the part of the Board of Directors
1390 of the North German Lloyd, as up to that time a restricting of the conflict to the powers immediately interested therein, namely, Austria and Servia, was counted upon, and we did not believe as yet in the active participation of Russia and France on the one side, and Germany on the other.

Accordingly, the Board of Directors did not as yet see any reason for any immediate decision in
1391 regard to the further movements of our ships.

In this interpretation of the Board of Directors there occurred a decisive change on the evening of the day mentioned, July 29th, owing to the fact that Captain Bartling, the manager of our nautical department, returning from a trip to Berlin on matters concerning his department, brought with him information in regard to a very serious interpretation of the political situation of various governmental officers; according
1392 to which it was already being seriously considered there that the remaining European great powers could be drawn in the pending conflict, and that there could be a general European war.

After the return of Captain Bartling, the members of the board of directors at Bremen held a meeting during the night to discuss the measures to be undertaken. They determined to delegate a member of the board of directors to pro-

ceed to Berlin in order that he might make inquiry of government officers and obtain information in regard to the development of events. Baron von Plettenberg was chosen to proceed to Berlin and he started that night. 1393

Special attention was paid by the Board of Directors to the Steamer *Kronprinzessin Cecilie,* after her departure from New York on Tuesday, July 28th, as this ship, owing to her route, had to appear endangered, in case of the breaking out of war, and also required our special attention, owing to the high value of the ship and the cargo. 1394

Upon instructions of the Board of Directors, the Nautical Department figured out exactly what was the latest time that the vessel would have, to receive an order in regard to the continuation or interruption of her journey, and we reached the conclusion that according to the supply of coal on hand, and the duration of the trip in question, the Board of Directors would have to come to a decision in regard to this by latest during the early hours of the afternoon of Friday, July 31st. 1395

In this connection, it was also taken into consideration that owing to the great congestion of the cable and wireless connections, a longer period of transmission of our telegram would have to be figured with. A period of time which actually from the departure of our telegram, July 31st, 2:45 p. m. until its receipt on board of the *Cecilie,* July 31st, 10:09 p. m. true time of place, even exceeded our expectations and actually resulted in the fact that the *Cecilie* could no longer return to New York in compliance with our order, but had to select the shorter route to Bar Harbor. 1396

1397 *Stipulation.*

The mission of Baron von Plettenberg, who arrived in Berlin on July 30th, in the morning, did not bear any positive results on this first day, as he could not obtain any decisive information and indications from the government offices visited by him, in regard to the probable further development of the political situation.

1398 Accordingly our interpretation of the political situation was still a predominantly confident and hopeful one on this day, July 30th, and we allowed our steamer *Main* to leave Bremerhaven for Antwerp as scheduled.

However, on the evening of this day, July 30th, there was issued a general warning to the German Merchant Marine Service, through the Admiralty staff. This warning, which became known to us the same evening, constituted the

1399 first official sign for us of the very serious interpretation of the political situation by the German government, and caused us, beginning with this period of time to begin sending the first telegraphic instructions for our vessels in regard to the further procedure of their trips.

On Friday, July 31st, shortly after 2 o'clock in the afternoon, we received from Baron von Plettenberg, the telegraphic information that he had learned from an authoritative source that the

1400 declaration of the state of war, "Erklarung des Kriegszustandes fur das deutsche Reich wegen drohender Kriegsgefahr," had been perfected, and would shortly be made public.

This "declaration of the state of war for the German Empire, owing to the 'threatening danger of war' " was then, soon afterwards, at 4:16 in the afternoon, brought to our knowledge by a telegram of the Imperial Marine Office, and the

1401

respective Imperial decree was publicly proclaimed on the same afternoon at about 5 o'clock, in Bremen also.

On the basis of this telephonic advice from Baron von Plettenberg, the telegram was sent to Captain Polack immediately at 2:45, upon the resolution of the members of the Board of Directors assembled at Bremerhaven, recalling the *Cecilie* to New York.

1402

The decree of the state of war for the German Empire, as quoted above, communicated to us by Baron von Plettenberg, offered to the members of the Board of Directors who participated in this resolution, the immediate reason for the recall of the *Cecilie*.

Compared with this decree of a state of war, all other political advices and facts which we had at the time, as expressed in the newspaper material are only of secondary and minor importance of a commentary and explanation of this governmental decree, from which could be seen the causes and gradual developments of the conflict, and the enemies to be expected in case of the breaking out of the war, which however, in itself, and without the supplementary act of the government in declaring the state of war would not, as yet have caused us to take immediate action in regard to our vessels.

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Therefore this decree of a state of war alone can be designated as the decisive fact inducing us to recall the *Cecilie*.

Consequently the explanation of all facts in detail requested, is rendered unnecessary, as to what induced us to send off our telegrams, as they are only of secondary importance.

Consequently the considerations which induced

1405 us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable.

3. A. Petzet, Director; Captain Bartling and G. Bock.

1406 Q. What director can testify as to the watch which was kept on the progress of events, and that the *Cecilie* was not ordered to return until her coal had been reduced to the minimum, which would permit of her returning?

A. The computations of our Nautical Department are as follows:

1407 On July 31st, at 10:09 p. m. when the ship received our telegram and turned her course on basis thereof, the ship was 46° 46′ N. Latitude and 30° 21′ W. Longitude; the distance to Plymouth still amounted to 1,057 nautical miles, the supply of coal amounted to 2,902 tons. [The remaining computations deal with the assumed consumption of coal by the vessel under various contingencies for 48 hours after July 31st.]

4. Captain Bartling and G. Bock.

1408 Q. What other vessels of the North German Lloyd were recalled, ordered to put back into neutral ports, or detained at Bremerhaven? What were the days and hours on which they were respectively recalled, and under what authority was the action taken?

A. We attach an accurate statement of all of our vessels, which in expectation of the breaking out of the war we ordered to neutral ports by wireless telegrams.

Stipulation.

1409

We would state that up to July 30th inclusive the scheduled steamer departures from Bremerhaven were followed, the last vessel being the *Main.* The departure of the vessel *Koenigen Luise* scheduled for August 1st in the morning to New York was cancelled owing to the danger of war.

The instructions to the various ships occurred pursuant to the direction of the Board of Directors arrived at during its various conferences, a formal written resolution of which does not exist. The execution of the instructions in individual cases was attended to by our Nautical Department, Capt. Bartling and Mr. Bock.

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STEAMER	FROM	DATE	DESTINATION	ADVISED DATE	PLACE OF RETURN RESPECTIVELY WHERE TELEGRAM WAS RECEIVED	ARRIVED	
						DATE	IN
Prinz Frdr. Wilh.	Polar Voyage			7/30, 3.30 P.M.	Spitzbergen	8/ 5/14	Bergen
Schleswig	Norwegian Voyage			7/30, 4.30 P.M.	Before Bergen	8/ 3/14	Bremerhaven
Posen	Antwerp	7/29	Australia	7/30, 5.26 P.M.	Off Vigo Spain	8/18/14	Rio de Janeiro
Prinz Eitel Frdr.	Japan		Europe	7/30, 6.00 P.M.	Shanghai	7/31/14	rem. Shanghai
Helgoland	East Asia		Europe	7/30, 11.00 P.M.	Port Said	7/31/14	" P. Said
Luetzow	Suez	7/31	Aden	7/31, 1.35 P.M.	Near Ras Gharib	8/ 1/14	Suez
Derfflinger	Suez	8/1, 9 P.M.	Port Said	7/31, 1.35 P.M.	Port Said	8/ 2/14	Port Said
Main	Bremerhaven	7/30, 12.05 P.M.	Baltimore	7/31, 1.50 P.M.	Off Scheveningen	7/31/14	Vlissingen
							Oporto, 8/3
Prinz Heinrich	Marseille	7/28 noon	Bremerhaven	7/31, 2.12 P.M.	Strait of Gilbraltar	8/ 1/14	Lissabon
Grosser Kurfuerst	New York	7/30 "	"	7/31, 2.40 P.M.	1 day's journey from N. Y.	8/ 2/14	New York
Kronpr. Cecilie	New York	7/28, 3.40 A.M.	"	7/31, 2.45 P.M.	Middle of the Atlantic	8/ 4/14	Bar Harbour
Friedr. der Grosse	Baltimore	7/29, 2. P.M.	"	7/31, 2.55 P.M.	2 day's journey from Baltimore	8/ 2/14	New York
Neckar	Havana		"	7/31, 3.09 P.M.	Havana	8/ 1/14	rem. Havana
Goeben	Gibraltar	7/29, 12. P.M.	"	7/31, 3.20 P.M.	Off Vigo	7/31/14	Vigo
Kleist	Columbo	8/2/5. A.M.	Aden	7/31, 3.20 P.M.	Off Colombo	8/ 7/14	Padang
Buelow	Lissabon	7/31 P.M.	Algeria	7/31, 3.40 P.M.	Off Lissabon	8/ 1/14	Lissabon
Sierra Nevada	Bahia	7/28, 12. night	Rio	7/31, 3.40 P.M.	603 sea miles before Pernambuco	8/ 2/14	Pernambuco
Coburg	Santos	7/29 P.M.	Pernambuca	7/31, 3.40 P.M.	Pernambuco	8/ 2/14	Pernambuca
Room	Colombo	8/1 noon	Australia	7/31, 4.30 P.M.	Off Colombo	8/ 8/14	Tjilatjap
Koeln		7/29, 1.45 P.M.	New York	7/31, 4.30 P.M.	Exit of the Channel	8/12/14	New York
Willehad	In Montreal			7/31, 4.30 P.M.	Montreal	8/ 5/14	Boston
Anhalt	Telok Betong	7/23, 11. P.M.	Europe	7/31, 4.40 P.M.	Off Colombo	8/21/14	Telok Betong
Wittekind	Rotterdam	7/27, 6 P.M.	Canada	7/31, 5.40 P.M.	2 days' journey from the Eng. Channel	8/ 9/14	Boston

1417

5. A. Petzet, M. Walter, C. Stapelfeldt, and Baron von Plettenberg Mehrum, Directors; Captain Bartling, G. Bock.

Q. Why did the wireless message state that war had broken out instead of merely stating that war was imminent? If, at the time of sending the message, the directors believed that war had actually broken out, the facts on which they based their belief should be stated in detail. Did the limitation of your code have anything to do with the form of this wireless message? If, so, to what extent?

1418

A. The reasons why we stated in our telegram to the *Cecilie* that the war had broken out, whereas, up to that time, as a matter of fact only the proclamation of a state of war, owing to the threatening danger of war had been issued, are the following:

1419

First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.

Secondly, we stated ourselves, when sending off the telegram that every other information in regard to the political situation, every statement that was not absolutely clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

1420

The sole information that the state of war had been proclaimed would probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations of political law.

Only the information that war had already

1421 broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

1422 Furthermore we had to count on quite a long period of transmission for our telegrams, during which time, therefore a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

1423 The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code.

6. Was the action of the North German Lloyd or of other German lines with reference to their ships based upon any official or semi-official information or communication from any branch or
1424 department of the German Government? If you feel that you can properly do so, please give us full information on this subject.

An answer to Question 6 was made by the directors of the North German Lloyd to Choate, Larocque & Mitchell, but under instructions that the answer should be considered as received in confidence and should not be divulged.

Stipulation.

1425

7. Kindly enclose with your answers to the above questions copies of whatever official or semi-official notices or documents you can procure bearing upon the subject matter of these interrogatories.

The following facts are likewise stipulated by the parties:

1426

The last English bound steamers of the Argo Company left Bremerhaven on July 30th for London and Hull and on instructions from their Company returned to Bremehaven August 1st without having discharged.

No German steamers left Hamburg or Bremerhaven for foreign ports after August 1st. 1914.

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1429 UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY,

v.

S. S. KRONPRINZESSIN CECILIE.

1430 CHARLES W. RANTOUL, JR.,

v.

S. S. KRONPRINZESSIN CECILIE.

MAURICE HANSSENS,

v.

1431 S. S. KRONPRINZESSIN CECILIE.

NATIONAL CITY BANK OF NEW YORK,

v.

S. S. KRONPRINZESSIN CECILIE.

1432 Deposition of EDWARD J. DONOHUE taken before a notary public at the office of Messrs. Convers & Kirlin, 27 William Street, New York.

New York, July 21, 1915.
3 P. M.

Present:

Messrs. CONVERS & KIRLIN (Mr. Hickox) for the libelant.

JOSEPH LAROCQUE, Esq., for the claimant.

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It is stipulated that the testimony may be taken by a stenographer, stenographer's charges to be taxable, signing, certification and filing being waived, a copy of the deposition to be served on proctor for the respondent.

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EDWARD J. DONOHUE, being duly sworn and examined as a witness for the libelant, testifies as follows:

By Mr. Hickox:

Q. Are you employed in the Custom House, New York? A. Yes sir.

Q. Have you in your charge the record of foreign clearances in the collector's office? A. Yes.

Q. And have you produced a record of the foreign clearances for Monday August 3, 1914? A. I have, yes, sir. 1435

Q. Will you state whether or not on that date the German steamship *Kronprinz Wilhelm* cleared at the Custom House and if so what the clearance was and for what port she cleared, and by whom, on behalf of the steamship, the necessary affidavit was made?

Mr. Larocque: Objected to as calling for the contents of a record. Furthermore, there is no proof that the entries in that record were made by this witness, or that he has any personal knowledge of the facts of the clearance. 1436

A. I made the record and I have a personal knowledge of the clearance, and can testify to the facts set forth in the affidavit.

1437 *Edward J. Donohue—Direct.*

Q. Did the German steamship *Kronprinz Wilhelm* clear at the Custom House on August 3rd? A. She did so clear.

Q. About what time? A. As near as I can recollect about 4.30, about closing of business on that day.

Q. Will you state the circumstances as closely as you can recollect them in connection with the
1438 clearance? A. If I remember rightly I was asked to remain after hours to clear the ship. I was also acting as shipping clerk of the First Marine Division with power to take affidavits of the masters. At this time I was Clearance Clerk in charge of entries and clearances of foreign vessels, and I was asked by a representative of Oelrichs & Company, agents of the North German Lloyd——

1439 Mr. Larocque: I object to that as a conclusion of the witness.

A. Well, by Mr. Hoppin, who was from the office of Oelrichs & Company, to remain after hours to clear the ship, and I told him no I would not do it unless I got orders from the collector, and before business had closed that day the captain came in the office with Mr. Hoppin and with the custom house broker who loads their
1440 vessels and he had the papers and I thereupon cleared the ship.

Q. Did the master state to what port his vessel was bound? A. From the record he was bound to Bremen. I have not the record before me.

Mr. Larocque: Objected to as not responsive. I move to strike it out. Ob-

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jected to also as secondary evidence, calling for the contents of a written statement.

Q. Did the master make affidavit before you as to the cargo that the vessel had on board and the port to which she was bound?

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Mr. Larocque: Objected to unless the statement is produced, being secondary evidence.

Q. Will you answer, please? A. The master swore to the outward manifest in which was expressed the loading of the vessel and destination.

Q. What was the destination? A. Bremen, if I remember, Bremen, Germany.

Q. Did you make a record in the books of the Custom House of the clearance of the vessel and of her port of destination? A. I made a record.

1443

Q. And of the name of the master? A. Yes sir.

Q. Is the record in this book which you produce in your handwriting? A. It is in my handwriting.

Q. Will you state what the record is? A. To the effect that on Monday August 3rd there was cleared at the Custom House the German Steamship *Kronprinz Wilhelm*, Grahm, master, 5162 tons, crew 527, point of destination Bremen, Germany, on which a fee of $2.50 was assessed,—collected.

1444

Q. Has it been paid since? A. It has been paid since, at the time the record was made it was not.

Q. Do you have to take this record back with you

to the Custom House? A. Yes, unless you get permission for me to leave it here.

Q. Is the affidavit sworn to by the master in the files of the Custom House now? A. It is not in the files now.

Q. Do you know where it is? A. I could not say.

1446 Q. Was a search made for it? A. I understand a search was made, I was only called in here this morning on the case, they said the record was missing or mislaid and could not be produced in court, and I was asked to bring the blotter as the next best record that we had of the clearance.

Cross-Examination by Mr. Larocque:

1447 Q. In whose handwriting are all the other entries under date of August 3rd in the record? A. In the handwriting of the clerk, who is charged with the care of the blotter. His name is Yander, he is under my direction.

Q. And the record of foreign clearances in this book you have referred to in your testimony? A. Yes, the daily blotter.

Q. It was not one of your duties, then, to make those entries? A. No, I was clerk in charge of

1448 the foreign clearances, and had general supervision over all work of that nature, and in the event of his being out I would cover him or any other clerk that carries on any work pertaining to the clearances of foreign vessels.

Q. Is it not usual in the Custom House to keep on file the affidavits of masters in clearing ships? A. Yes sir, it is.

Q. Do you know what has become of this particular affidavit? A. I do not.

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Q. Have you any record to show what has become of it? A. I have no knowledge of the record, that would show what became of it.

Q. Is there any record? A. That I could not say. I don't know whether there is a card on file as to who took it from the file.

Q. Is it not unusual to remove one of these affidavits from the file? A. It is unusual.

1450

Q. You have no knowledge as to whether or not the ship ever reached Bremen? A. I have no knowledge.

Q. I suppose you do know that she has been converted into an auxiliary cruiser?

Mr. Hickox: Objected to unless the witness has any absolute knowledge on the subject.

1451

Q. She has been converted into an auxiliary cruiser? A. I have heard so, yes sir.

Q. What was the name of the man you said you had the interview with in regard to this clearance? A. Mr. Hoppin.

Q. How do you spell that name? A. Franz Hoppin.

Q. Were Mr. Hoppin and the master the only persons you saw in reference to the clearance? A. And the custom house broker who repre- 1452
sented him.

Q. Who was the custom house broker? A. Samuel Godwin, custom house broker.

1453 UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY OF NEW YORK,
Libelant,

AGAINST

1454 STEAMSHIP KRONPRINZESSIN CECILIE, NORTH GERMAN LLOYD,
Claimant.

CHARLES W. RANTOUL, JR.,
Libelant,

AGAINST

STEAMSHIP KRONPRINZESSIN CECILIE, NORTH GERMAN LLOYD,
1455 Claimant.

MAURICE HANSSENS,
Libelant,

AGAINST

STEAMSHIP KRONPRINZESSIN CECILIE, NORTH GERMAN LLOYD,
Claimant.

1456 NATIONAL CITY BANK OF NEW YORK,
Libelant,

AGAINST

STEAMSHIP KRONPRINZESSIN CECILIE, NORTH GERMAN LLOYD,
Claimant.

Stipulation.

IT IS HEREBY STIPULATED AND AGREED by the proctors for the parties in the above-entitled cases, that the foregoing is a true transcript of the record in the said cases, as agreed on by the said parties. 1457

Dated, September 20, 1915.

CONVERS & KIRLIN,
Proctors for Guaranty Trust Company,
Charles W. Rantoul, Jr., and
Maurice Hanssens, Libelants. 1458

SHEARMAN & STERLING,
Proctors for National City Bank,
Libelant.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

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1461 UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY OF NEW YORK,
Libelant,

vs.

1462 STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD,
Claimant,

CHARLES W. RANTOUL, JR.,
Libelant,

vs.

STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD,
1463 Claimant,

MAURICE HANSSENS,
Libelant,

vs.

STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD,
Claimant,

1464 SIRS:

PLEASE TAKE NOTICE that we have entered our appearances in the above entitled cases as proctors for the libelants herein in place and stead of Convers & Kirlin.

Yours, etc.,

KIRLIN, WOOLSEY & HICKOX,
Proctors for Libelants.

To:
CHOATE, LAROQUE & MITCHELL,
Proctors for Claimants.

1465

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

Re Steamship *Kronprinzessin Cecilie.*

GUARANTY TRUST COMPANY OF NEW YORK,
vs.
STEAMSHIP "KRONPRINZESSIN CECILIE", North German Lloyd, Claimant.

No. 1069.

1466

CHARLES W. RANTOUL, JR.,
vs.
STEAMSHIP "KRONPRINZESSIN CECELIE," North German Lloyd, Claimant.

No. 1070.

1467

MAURICE HANSSENS,
vs.
STEAMSHIP "KRONPRINZESSIN CECELIE," North German Lloyd, Claimant.

No. 1075.

1468

NATIONAL CITY BANK OF NEW YORK,
vs.
STEAMSHIP "KRONPRINZESSIN CECELIE," North German Lloyd, Claimant.

No. 1076.

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1469 OPINION OF THE COURT.

February 1, 1916.

KIRLIN, WOOLSEY & HICKOX: J. Parker Kirlin and Charles R. Hickox of New York City for Guaranty Trust Company of New York, for Charles W. Rantoul, Jr., and for Maurice Hanssens.

SHEARMAN & STERLING: James M. Beck and Carl A. Mead of New York City for National
1470 City Bank of New York.

BLODGETT, JONES, BURNHAM & BINGHAM: Edward E. Blodgett of Boston for libelants in all four cases.

CHOATE, LAROCQUE & MITCHELL: Joseph Larocque, Walter C. Noyes and Joseph D. Bedle of New York City for claimant in all four cases.

1471 HALE, District Judge. In the first case, No. 1069, the Guaranty Trust Company of New York, seeks to recover damages for breach of contract, by the steamship, in failing to carry a consignment of gold from the port of New York to the port of Plymouth, England. The libel alleges that on July 27, 1914, the steamship was lying in the port of New York, bound for Bremerhaven, Germany, by way of Plymouth, England; that on that date the libelant delivered to the steamship
1472 in good order and condition ninety-three kegs of gold bullion, of the agreed and declared value of $4,942,936.64, to be carried to Plymouth, England; thence to be forwarded to London; to be there delivered in like good order and condition to the order of the libelant, in consideration of $9,268, prepaid freight; that the steamship delivered to the libelant a bill of lading therefor; that, in violation of her contract, the steamship, when about

900 miles from Plymouth, abandoned her voyage and put back to Bar Harbor, Maine; where, on or about August 8, 1914, the libelant accepted re-delivery of the ninety-three kegs of gold from the steamship, under an agreement that such re-delivery should not constitute a waiver of libelant's claim for breach of contract. By reason of such failure of the steamship to deliver the gold at 1474
Plymouth, the libelant says, it has suffered damage exceeding the sum of $1,104,467.43; the libel is subsequently amended, increasing the amount claimed as damages to $1,793,278.22; and the libelant says that no part of this sum has been paid.

The answer admits the receipt of the ninety-three kegs of gold bullion; and alleges that the carriage of the same was undertaken by the claimant subject to the conditions and exceptions 1475
contained in the bill of lading, which is made a part of the answer; subject also to the possibility of the ship being prevented from concluding her voyage and being forced to put back into a port of refuge, in case of outbreak, or threatened outbreak, of the European war. It admits that the steamship turned back on her course, and says that at the time of turning back she was about 1,070 miles from Plymouth; it alleges that the de-
cision of the master to return to a port in the 1476
United States was based upon credible information received by him from the North German Lloyd office at Bremen by wireless message that war had broken out involving Germany and Russia, France and England; and that this message, considered in conjunction with the information with respect to the European crisis received by him prior to sailing, furnished reasonable

ground for him to apprehend that the steamship and cargo would be captured if she continued on her voyage; and required him, in the exercise of sound judgment and discretion, to put back to a port of refuge; that, though war had not actually broken out at the time of the receipt of this wireless message, still the master, in anticipation of
1478 an outbreak of hostilities, and the consequent danger of arrest of the members of his crew, the arrest or probable detention and discomfort of his passengers, and the capture of his ship and cargo, was fully justified in adopting the course which he did adopt.

The answer denies that the steamship violated any contract, or any other duty. It admits that, on or about August 8, 1914, the libelant accepted re-delivery of the gold; it alleges that such re-de-
1479 livery was at the libelant's special request; it denies that by reason of the alleged failure of the steamship to deliver the gold at Plymouth, the libelant has suffered any damage.

As a second defense, the answer details the facts in connection with the attachment of the gold, the incidents of the voyage, the danger of capture had the ship proceeded on her voyage; it alleges that the action of the captain in directing
1480 the return of the steamship to the United States was in concurrence with instructions from her owners; that such instructions and the action following them were fully justified by the circumstances, and were the exercise of a right given by the laws of the United States, as well as by the German Maritime Code. The answer further alleges that the course followed by the captain was successful; that his return to a port of refuge, and the delivery of the specie to the parties en-

titled to it, were accomplished without the capture or detention of a single passenger or member of the crew, and without loss or damage to any of the specie, or to any other part of the cargo. 1481

As a third defense, the answer asserts an exception in the bill of lading against liability for the loss or damage "occasioned by arrest and restraint of princes, rulers or people." 1482

As a fourth defense, the answer alleges a provision in the bill of lading whereby neither the ship nor carrier should in any case be responsible for a value greater than that declared by the shippers in the margin. It sets out the value of the shipment as already stated; that all the gold representing the shipment, and the value thereof, was re-delivered by the claimant to the libelant at Bar Harbor; that, upon such re-delivery, all responsibility of the claimant, and of the ship, came 1483 to an end.

As a fifth defense, the answer alleges that it was agreed that time should not be of the essence of the contract; that the bill of lading expressly provided that the steamer should have "liberty to call at intermediate ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes"; that it was also agreed 1484 that the steamer should have liberty to put into a port of refuge; and that neither the steamer nor carrier should be liable for "loss or damage by prolongation of the voyage."

Certain facts are stipulated with clearness and brevity; the libelant is a corporation organized under the laws of the State of New York, having its office in New York and a branch office in London. The claimant, North German Lloyd, is

1485 a corporation organized under the laws of Bremen, existing under said laws, and the laws of the German Empire; and is the owner of the *Kronprinzessin Cecilie*. The steamship was built in 1907 at a cost of about $4,500,000. On July 27, 1914, the libelant shipped on board the steamer ninety-three kegs containing gold bars owned by
1486 the shipper of the value, at the time and place, as set forth in the libel. By the terms of the contract, the gold was to be carried by the steamer from New York to Plymouth, England, thence to be forwarded at the steamer's expense, but at the owner's risk, to London, unto the Guaranty Trust Company of New York, or its assigns, subject to the provisions and exceptions of the bill of lading, which I need not recite in full, but to which I may make further reference. This bill of lading was
1487 delivered to, and accepted by, the libelant as the contract of carriage, covering the shipment. The steamer was fully manned, outfitted and equipped, and sailed on the voyage from New York on July 28, 1914, about one o'clock in the morning; she continued on the voyage until the night of July 31 at about nine minutes past ten o'clock in the evening, ship's time, when she turned back towards New York. At the time of turning back,
1488 the steamer was in the position of forty-six degrees and forty-six minutes, north latitude, and thirty degrees, twenty-one minutes, west longitude from Greenwich, a distance of about 1,070 nautical miles from Plymouth. Just before turning back, about ten o'clock in the evening, a wireless message was received on board of the steamer from the directors of the North German Lloyd at Bremerhaven, in private code. The translation of the message reads as follows: "War has

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broken out with England, France and Russia. Return to New York." It was signed by the managing directors of the North German Lloyd. This wireless message was sent out by the managing directors of the claimant company, after the publication of the decree of threatened danger of war; after having been informed of the intention of the government to despatch on that day the notes to Russia and France which are referred to in the German White Paper; after a general warning by the Admiralty to the German Merchant Marine; and after the directors had received reliable information that a declaration of a state of war had been perfected and would shortly be proclaimed.

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After turning back, the steamer proceeded in a westerly direction toward the United States, and put into Bar Harbor, Maine, on August 4, 1914, where she dropped anchor about four o'clock in the morning. By arrangement between the parties and the Navy Department of the United States, the steamer was afterwards moved to Boston Harbor, where she now lies. On August 8, 1914, the claimant re-delivered to the libelant, at Bar Harbor, Maine, the ninety-three kegs of gold bars, being all the gold which the claimant had received from the libelant for carriage to England. On November 17, 1914, the claimant, without admitting liability, refunded to the libelant $1,544.67, being the proportion of the prepaid freight covering the inland transportation of the libelant's gold from Plymouth to London; the acceptance of this refund by the libelant being without prejudice to its claim against the steamship and her owners for their alleged failure to deliver

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the gold in accordance with the terms of the contract.

Certain historical facts are agreed upon, as part of the proofs. Those stipulated as having happened before the ship sailed from New York are as follows: On June 23, 1914, Archduke Francis Ferdinand, of Austria, and his wife, the
1494 Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia. On July 23rd, Austria sent an ultimatum to Servia, the terms of which appear in the German White Paper and the British White Paper. On July 24th, Russia urged that Austria abandon the time limit of her ultimatum "in order to prevent consequences equally incalculable and fatal to all the powers which might result from the course of action followed by the Austro-Hungarian Government."
1495 The Russian Government informed the other Powers that, if the Austro-Hungarian Government should make war on Servia, Russia could not allow the conflict to be settled between those two countries alone. The French Ambassador at St. Petersburg gave the English Ambassador at St. Petersburg to understand "that France would fulfill all the obligations entailed by her alliance with Russia, if necessity arose, besides support-
1496 ing Russia strongly in all diplomatic negotiations." The German Government emphasized to other Powers its opinion that there is only question of a matter to be settled exclusively between Austria-Hungary and Servia, and that other Powers ought to reserve it to those two, because interference of another Power, owing to different treaty obligations, would be followed by incalculable consequences. On July 25th, Austria declined the Russian request for extension of time

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limit in ultimatum to Servia. Servia replied to the Austrian ultimatum at 6 P. M. The terms of the reply are shown in German and British White Papers. Austria advised Servia and the other Powers that she considered Servia's reply unsatisfactory. The Austrian Minister left Belgrade at 6.30 P. M. The Servian Government moved from Belgrade to Nish the same evening. 1498
Germany confined her Alsace-Lorraine garrisons to barracks, and placed the frontier works of Alsace-Lorraine in a complete state of defense. The populace in Berlin made demonstrations in favor of war; Servia ordered mobilization; Russia began to take military precautions; martial law was proclaimed in Austria. On July 26th, Austria severed diplomatic relations with Servia, and sent passports to the Servian Minister. Austrian mobilization against Servia was decreed. 1499
Austria advised Russia that she sought no territory of Servia, and did not intend to impair the sovereignty of that country, but that, aside from that, she was prepared to go to the "furthest extremes" to obtain satisfaction of her demands. The Austrian Ambassador at Washington instructed consuls in the United States to tell reservists to prepare to return home for service. The Servian army began mobilization. There 1500
was a panic in Belgrade as the people fled from the city. American tourists left Carlsbad and other resorts. Belgium increased her army to enforce neutrality. The German fleet was concentrated in the home waters. Germany indicated to her railroads the measures preparatory for concentration. Germany urged the other Powers not to interfere with Austo-Hungarian plans to discipline Servia. The German Ambassador at

1501 St. Petersburg was directed to make the following declaration to the Russian Government: "Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed
1502 against both Russia and France. We cannot assume that Russia desires to unchain such a European war. Since Austria-Hungary will not touch the existence of the Servian Kingdom, we are of the opinion that Russia can afford to assume an attitude of waiting. We can all the more support the desire of Russia to protect the integrity of Servia, as Austro-Hungary does not intend to question the latter. It will be easy in the further development of the affair to find a basis
1503 for an understanding." The Russian Secretary of War gave the German military attache his word of honor that no order to mobilize had been issued, merely preparations were being made, but not a horse mustered, nor reserves called in. If Austria-Hungary crossed the Servian frontier, such military districts as are directed toward Austria, namely Kiev, Odessa, Moscow, Kazan, would be mobilized; under no circumstances
1504 those on the German frontier, namely, St. Petersburg, Vilna, Warsaw. He added that peace with Germany was desired very much. The military attache told the Secretary that Germany appreciated Russia's friendly intentions, but considered mobilization, even against Austria, as very menacing. Sir Edward Grey proposed to the Powers a conference in London between himself and the Ambassadors of Germany, France and Italy for the purpose of discovering an issue that

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would prevent complications. If agreed to, the representatives of these Powers were to request authorities at Belgrade, Vienna and St. Petersburg to suspend active military operations pending results of conference. Russia asked Austria to take back her ultimatum, and modify its form, and, if this were done, offered to guarantee the result. Russia informed Italy that the Austrian-
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Servian conflict could not be localized. Austria notified the Powers that the refusal of Servia to accept the Austrian demands in full, without reservations, would compel Austria to force Servia by the most drastic measures to a complete submission. Russia announced that she could not be asked to allow Servia to be crushed. The German fleet in Norway put to sea, and Austria ordered partial military and naval mobiliza-
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tion. On July 27th, Germany completed requisitions, and placed her covering troops in position in Alsace-Lorraine. Russia notified Austria that if war broke out between Austria and Servia, Russia would not give way. The Vienna and Budapest bourses closed. A skirmish occurred on the Danube between Austrian and Servian forces. England stated to Germany that, if Austria, notwithstanding the terms of the Servian reply, should invade Servia, she would prove she
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wished to crush a small state. This would raise a European question, and a war would ensue in which all the Powers would take part. France, Italy and Russia agreed to Sir Edward Grey's proposal of the 26th for a conference of ambassadors in London. State of war declared in Russian Province of Kovno. Belgian army was mobilized. Shots were fired by a Cossack patrol on a German patrol at the Russian frontier. The

14th Corps of the French army discontinued manoeuvers, and returned to its garrison. Information to this effect was received in Berlin. Germany refused Sir Edward Grey's proposal for a conference of ambassadors at London. The Czar informed the Crown Prince of Servia, if all efforts for peace failed, Russia would not disin-
1510 terest herself in the fate of Servia. Russia proposed to Austria that desired modifications in latter's demands on Servia be the subject of direct conversations between St. Petersburg and Vienna.

The proofs show that a newspaper called the "Ocean Gazette" was printed on the steamship; and that on July 29th a copy of the paper contained a wireless despatch from London announcing that:

"A formal declaration of war was made by
1511 Austria on Servia to-day and active hostilities between the two countries have already begun. Two Servian steamers were to-day attacked on the Danube, the Servian colors hauled down and the Austrian colors hoisted.

Germany has declined the proposal of Sir Edward Grey for a conference of ambassadors of the powers in London; Austria also formally declined the proposals. Orders for the German fleet to concentrate in home waters have been issued
1512 and the British first and second battle squadrons are in readiness for service.

A despatch from Berlin says a Russian force has occupied positions near the frontier of Russian Poland and that a squadron of German cavalry has also advanced to the frontier.

Emperor Franz Josef has granted complete amnesty to all Austro-Hungarian subjects who have deserted from the army or who emigrated to other lands to avoid military duty."

The text of Austria's declaration of war was also printed. On July 31st, the Ocean Gazette published another wireless despatch from London:

"Germany sent an ultimatum to Russia, demanding an explanation for the latter's mobilization. The answer is to be given within the next 24 hours. 1514

Fighting between Austrian and Servian forces is reported to-day at several points and the invading forces are meeting with stout resistance. Despatches received at the Servian legation in London say that the Austrians were repulsed, while trying to cross the Danube twenty miles east of Belgrade and at Losnitza, west of Belgrade.

The southern column of Austrians in Bosnia is reported to be watching the Montenegrin troops. In a severe battle at Fotcha in Bosnia the Austrians defeated the Servians with several hundred killed on each side. 1515

The gravity of the international situation is recognized in all European capitals.

Russia proceeded with her mobilization of a large number of troops while the French defensive forces took extensive precautions.

Business was practically suspended on the London Stock Exchange to-day, pending the serious war situation. Dealers refused to make prices. 1516 The consols reached a record low price of 69½, the lowest in a century. Seven failures were reported to-day. St. Petersburg, Vienna, Budapest and Brussels Exchanges also remained closed; two failures were announced on Glasgow Exchanges.

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The Shimbum, a semi-official newspaper of Japan, declares to-day that if England is at-

tacked, Japan will give assistance to the British arms.

WASHINGTON. Administration officials are awaiting additional developments in European politics. If other nations than Austria and Servia are drawn into the conflict probably a proclamation of neutrality covering the entire situation will be determined upon by the State De-
1518 partment."

Captain Polack, the master of the steamship, testified that he had followed the sea since 1875; he had been in the North German Lloyd service since 1886; he had been a master since 1900, and in command of this steamship since May, 1913; when he took command of the ship, he was given a sealed package, and was instructed to open the package at any time in the future in case he received a
1519 message signed "Siegfried"; and relating to some disease. On July 31st, at ten o'clock in the evening, ship's time (11.45 Greenwich time), a wireless message was brought to him on the bridge by the chief officer. The message was in German, and it related that somebody had fallen sick; it was signed "Siegfried." Upon opening the sealed package, he found a code which enabled him to translate the wireless message as
1520 follows: "War has broken out with England, France and Russia. Return to New York." (It is in evidence that the translation from the German of the last clause is more literally "*Turn back* to New York"). The name Siegfried meant "The board of directors of the North German Lloyd." After he had opened and read the message, the captain testifies, he immediately gave orders to turn the ship around toward the west; he had kept in touch with the situation before

sailing, and knew in a general way how critically events had been developing; and, while on the water, he had felt anxiety as to receiving some message informing him of present conditions; he had discussed the matter with his chief officer the night of July 30th, and was very anxious to "get news from home about the political situation, and about this war," and had asked other ships about 1522
war news; so that, when he received the message, he assumed that the home office was fairly well informed as to the situation. He was then asked what appealed to his judgment upon receipt of the message as to the best course to pursue; he answered: "Well, after receiving that message which read 'War has broken out with England, France and Russia,' there was only one way to do, to go back to the United States, to the west; not to run into any danger." 1523

1. Was the master of the steamship justified in turning the ship about, deviating from his direct course, and proceeding westward?

The libelant alleges that he was not justified; that, in fact, he exercised no discretion about the matter, and acted merely under orders from his managing directors; and that, under the maritime law, and under his contract, the conduct of the master and of the ship was unjustifiable. The 1524
answer raises the sharp contention that:

"The return of the *Kronprinzessin Cecilie* to a port of the United States was not only a justifiable precaution, but was based upon reasonable ground for apprehension of capture and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew and to the cargo owners; and was a measure adopted by him in good faith in the exercise of

his best judgment and discretion for the benefit of all concerned."

I have already stated the facts which may fairly be held to be within the knowledge of the ship, and of the master, at the time of turning back on July 31st, at ten o'clock in the evening; the master has testified that he kept in touch with
1526 the situation of affairs up to the time of sailing; and that on the voyage he had, from time to time, received information by way of the Sayville wireless station in regard to the progress of events; that this information was published in the Ocean Gazette; that he was awaiting information from the owners by wireless; and that, when he received his message on the evening of July 31st, he acted not only in accordance with his instruc-
1527 tions, but in accordance with the dictates of his own best judgment, which was to go back to the United States, "and not to run into any danger."

In *The Styria*, 186 U. S. 1, 19, 20, these facts were disclosed:

"*The Styria*, an Austrian steamship, sailing from Trieste, by way of Sicilian ports to New York, took on board, at Port Empedocle, Sicily, a quantity of sulphur for New York. Before sailing, the master learned that war had broken out
1528 between Spain and the United States; as sulphur was an article contraband of war, he had the sulphur unloaded and ware-housed at Port Empedocle before sailing. This court held that the master of the *Styria* was justified in relanding and ware-housing the contraband portion of the cargo, and that in so doing he had reasonable regard for the interests of both ship and cargo."

Speaking for the Supreme Court, Mr. Justice Shiras referred to the fact that a suggestion had

been made by the District Court, and repeated in argument by the libelants, to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from agents in London "rather than by his own judgment on all the circumstances known to him at the time." In disposing of this contention, the learned Justice said: 1530

"Without transcribing all of the master's testimony, but having read and weighed it, we are of the opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with a contraband cargo, nor proper to wait indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both 1531 that which was contraband and that which was not so. So far as the ship owners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf. * * * Without protracting the discussion, we are of the opinion that the master was justified in landing and storing the cargo that had become contraband by reason of the outbreak of the war 1532 between Spain and the United States, and by the Spanish proclamation of April 23rd; that, having acted reasonably with due regard to the interest of all concerned in so doing, it was not made his duty, by the facts brought to his notice, to reship the sulphur on the *Styria* and further delay his voyage."

In Nobel's Explosives Co. *v.* Jenkins, L. R. (1896) 2 Q. B. Div. 326, the case showed that a

general cargo ship sailed from London to Yokohama with a cargo of dynamite which was contraband of war. On arriving at Hongkong the master landed the cargo, after cabling for instructions from the owners of the vessel, for the reason that war had been declared on that day between China and Japan. It was held in the Queen's
1534 Bench Division, that the probability of capture of the cargo steamer on the thousand miles of sea between Hongkong and Yokohama justified the shipper in refusing to carry the cargo beyond Hongkong. In giving the judgment of the Court, Matthew, *J.*, observed:

"Apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted
1535 to him. Whether he has discharged that duty must depend on the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiff confiscated. In the words of Willes, *J.*, in Notara *v.* Henderson, L. R. 7 Q. B. 225, at p. 234, 'a fair allowance ought to be made for the difficulty in which the master may be involved.' * * * It was said that the master was not an agent for
1536 the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

This case was cited and followed in the *Styria*, where, after quoting a considerable part of the opinion, Mr. Justice Shiras said:

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"The master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and all that can be said is, that there was a concurrence of judgment between the ship 1538
agents and the master as to what was the proper course to pursue."

In *The Teutonia*, L. R. 4 P. C. 171, the case disclosed these facts:

A suit was brought in the admiralty by a Liverpool firm against a Prussian brig, whose owner, master and crew were all Prussians, for breach of a charter party entered into by the master and a branch of the Liverpool firm at 1539
Valparaiso, by which the master agreed to carry a full cargo of bags of nitrate of soda from Pisagua, South America, to Cork, Cowes or Falmouth, as he might elect, and thence to such port as the Liverpool firm might order between Havre and Hamburg, and there deliver the cargo.

The bill of lading contained an exception against the Act of God, the Queen's enemies, fire, and all and every other dangers and accidents of seas, rivers and navigation of whatever nature 1540
and kind soever; but the decision of the case was not based on this exception.

The ship with her cargo arrived at Falmouth on July 10, 1870, and while there the master heard rumors that war was probable between France and Prussia.

On July 11, the master received orders to proceed to the port of Dunkirk and there deliver the cargo; and at once set sail for Dunkirk, and ar-

rived at a distance of about 14 miles off that port at 12 o'clock at night on July 16th, which was Saturday.

After lying to for about two hours, a pilot came on board, and the master asked him about the war as to which he had heard rumors at Falmouth. The pilot told him that war had been declared two days before. He then asked the pilot
1542 where he could bring him in safety, and the pilot offered to take him to Flushing, or the Downs, or wherever he liked.

The master thought it prudent to proceed to the Downs, and he anchored off there on Sunday morning, the 17th. He could get no advice or information on that day; and on Monday, the 18th, he went ashore at Deal, and was told by the German consul that war had broken out between France and Prussia. He then telegraphed to the
1543 owner, who was his father, and received an answer on Tuesday, the 19th, forbidding him to go to Dunkirk, and, on the same day, took his vessel into Dover, the nearest and safest port.

On July 19th the French declaration of war was delivered to the Prussian Government at Berlin; which was known the same day by telegraph in England.

The Privy Council held that the master, when he was informed on his arrival off Dunkirk by the pilot, although incorrectly, that war had been ac-
1544 tually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries.

In giving the judgment of the Privy Council, Lord Justice Mellish observed:

"If the master had entered Dunkirk, and it had turned out that war had been previously declared,

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he would have entered it with notice that he was entering an enemy's port, and this would have obviously exposed his ship to condemnation, and might have exposed himself to severe penalties when he returned to his own country. It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as, for instance, that there are 1546 pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of Pole *v.* Cetcovich (9 C. B. (N. S.) 430), is an authority in point."

The San Roman, L. R. 5 P. C. 301; Embiricos 1547
v. Reid & Co., L. R. 3 K. B., 45; *The Heinrich*, L. R. 3 A. & E., 424; *The Wilhelm Schmidt*, 25 L. T. N. S., 34.

In the case at bar, Captain Polack, the master of the steamship, was examined before me at length, and was subjected to a very able and critical cross-examination. He impressed me as being a truthful man, and a faithful, trustworthy shipmaster. He showed a clear appreciation of the trust imposed in him. The proofs lead me to the 1548 conclusion that, on the evening of July 31st, 1914, as he stood upon the bridge of his ship, he had knowledge of the events, just referred to in detail, up to the time of the sailing of the ship from New York; that he had knowledge also of the important events which had happened after the ship left New York, and which were published in the newspaper printed on the steamship; he knew

that Austria had declared war on Servia, and had commenced active hostilities; that Germany and Austria had declined the English proposal for a conference of the Powers in London. The facts within his knowledge tended to the conclusion that his country was upon the very edge of war with Russia, France and England. In addition to this knowledge, he now receives information from 1550 the owners of the ship that war has broken out between Germany, England, France and Russia. He is within 1,070 miles of Plymouth, England. If he proceeds much further, there will not be sufficient coal left in his bunkers to return to the United States.

It is true, then, in the case at bar, as it was in the case of the *Teutonia*, that the shipmaster had received credible information that, if he continued 1551 in the direct course of his voyage, his ship would be exposed to an imminent peril. Upon the information which Captain Polack received, and the facts within his knowledge, he acted, I think, with a reasonable apprehension of impending danger. He was justified in deviating from his direct course eastward; and in doing this he was acting with a due regard for the safety of his ship, his passengers, and his cargo. In the light of what he knew, his clear duty was to turn about at the 1552 time he did. He was also instructed by the owners of the ship to turn about; and, if the case were one arising between him and the shipowners, those instructions might well be held, within certain limitations, to be conclusive. But, as between the parties to this controversy, those instructions were not decisive. They would not protect him if harm came to those who had intrusted their lives and property to his care and fidelity. They

should not prejudice him now, in these proceedings. The message received by the captain did not consist of instructions alone; it contained a statement of an important fact. It is clear that the shipowners thought it necessary to give facts for their captain's guidance, as well as to give him instructions. By giving him such facts, they showed that they still relied upon his discretion; 1554
they recognized that he was captain of their steamship, and they did not expect a slavish following of arbitrary orders. But, whatever the communications between the master and the shipowners, the passengers and the shippers were not concluded by these communications. This libelant had the right, and is now seeking to enforce the right, to look to the ship and to its master. The master's instructions did not add anything to his duty in reference to the care of the ship, pas- 1555
sengers and cargo; they did not subtract anything from that duty. In an emergency, he must act for the protection of all interests committed to his care. Captain Polack was situated in this respect much as was the captain of the *Styria*. In what he did he had the approval of the shipowners; he acted in concurrence with their views. So far as the shippers and passengers were concerned, he was under the duty to act upon his own 1556
judgment, to be exercised in good faith on their behalf. In the *Styria*, Mr. Justice Shiras clearly defined the duties of the master of a ship at sea:

"The master of a ship is the person who is intrusted with the care and management of it; and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interests of his employers, the

utmost fidelity and attention. Abbott on Shipping, 7th Am. Ed., 167. * * * All will agree that the master must act in good faith and exercise his best discretion for the benefit of all concerned. New England Insurance Company v. *The Sarah Ann*, 13 Pet., 400; *The Amelia*, 6 Wall., 27."

1558 In the Ancient Laws of the Sea it was said:

"When voyages are undertaken, the Master is put in by the Owners, and they ought to make good the Master's Fact and Deed; and therefore as the whole Care and Charge of Ship and Goods are committed to the Master, it is the prudence of the Owners to be careful who they will admit Commander of their Ship."

It is argued by the learned proctors for the li-
1559 belant that, in the progress of these later years, shipowners are able to communicate with their ships by wireless, and to control them; that, for this reason, there is a tendency in the courts to limit the great power of a master of a ship at sea. There was much interesting discussion touching this matter at the hearing of the cause. It is urged in behalf of the libelant that a ship-master in command of a vessel operating as a
1560 common carrier, in the absence of immediate and compelling necessity, has no authority or discretion to vary the shipowner's contract of carriage, or to depart from his voyage. *The Julia Blake*, 107 U. S., 418, is brought to my attention as a leading authority. That case arose upon a suit by the holder of a bottomry bond against the ship, her cargo and freight. *The Julia Blake* had been damaged by stress of weather, and forced to put into St. Thomas for repairs, where her cargo was

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unloaded. It would have been possible to forward the cargo at reasonable expense by some other vessel to New York; instead of forwarding the cargo, the master hypothecated it and the freight, upon bottomry bond, to the Bank of St. Thomas; he did this without communicating with the cargo owners. Upon the arrival of the ship at New York, the bond was not paid. The Supreme Court held that the master of a ship cannot sell nor hypothecate the cargo, except in case of urgent necessity; that in the case of the *Julia Blake,* no such necessity appeared; and the cargo owners were not liable. In speaking for the Court, Mr. Chief Justice Waite observed:

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"He (the master), acts for the owner of the cargo because there is a necessity for someone to do so; and like every agent whose authority arises by implication of law, he can only do what the owner, if present, ought to do. Necessity develops his authority, and limits his powers. What he does must be directly, or indirectly, for the benefit of the cargo, considering the situation in which he has been placed by the acceptance of the voyage. * * * But at all events, the necessity must be such as to connect the act with the success of the voyage, and not for the exclusive interests of the shipowner. * * * All will agree that the master must act in good faith, and exercise his best discretion for the benefit of all concerned, and that it can only be done upon the compulsion of necessity, to be determined in each case by an actual and impending peril to which the vessel is exposed."

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Further in his opinion, after considering the circumstances of the case, the Chief Justice said:

"It must have been easy to see that to repair the vessel at the risk of the owner of the cargo

would be to place his interests in jeopardy, without any urgent necessity of his account. No master who 'held the balance evenly between his two principals' could have believed himself justified under the circumstances, in hypothecating the cargo for any such purpose, without notice to the owner."

1566 So far as it goes, I think, the case of *The Julia Blake* states the law in substantial accordance with the law of *The Styria*, and of the other cases to which I have called attention. In *The Julia Blake*, the Court was not dealing with the case of a master in an unexpected emergency; and the Court found that the circumstances of that case did not justify the master in hypothecating the cargo. The case does not take away from the captain his power to act under a reasonable dis-
1567 cretion, or his power to exercise his judgment in case of emergency for the protection of all the interests committed to him. My attention is especially called also to the case of Brauer *v.* Compania Navigacion La Flecha, 57 Fed., 403, where Judge Addison Brown held that the master was not justified in making a jettison in the absence of any compelling necessity, and upon mere apprehension of danger. Here, again, the Court
1568 found that the circumstances did not warrant the act of the master, where he had sacrificed a deck-load of cattle in bad weather without present necessity, solely from apprehension of further storms, and when there was "no reasonable or apparent necessity for this sacrifice." The case was affirmed by the Supreme Court. Other important and interesting cases have been brought to my attention; among others, Codwise *v.* Hacker, 1 Caines, 526; *The Roebuck*, 2 Asp. Mar.

Law Cas., N. S., 387. Many cases to the same point are cited. Another class of cases are urged upon my consideration where the courts have held that mere fear of war does not justify a breach of a maritime contract. Among these cases are Atkinson *v.* Ritchie, 10 East, 530; Forster *v.* Christie, 11 East, 205; Richardson *v.* Maine Ins. Co., 6 Mass., 102; King *v.* Delaware Ins. Co., 6 1570
Cranch, 71. In the case last cited, the Supreme Court adverted to the danger of holding that false intelligence, received on a voyage, might justify a captain in acting as if that intelligence were true. Upon a careful consideration of all the cases brought to my attention touching the subject, I am persuaded that the law is nowhere better declared than in the cases of *The Styria, The Teutonia,* and Nobel's Explosives Co. *v.* Jenkins. These cases state the rule clearly, I 1571
think, that, apart from the terms of any maritime contract of carriage, a shipmaster at sea is under a plain duty to take care of all interests intrusted to him; he is justified in deviating from his direct course, when in reasonable apprehension of imminent peril; and the courts are to apply the test whether, in any case, and under any emergency, the master has discharged his duty, under all the circumstances of each case. Upon this subject 1572
other courts have quoted the words of Wiles, J., in Notara *v.* Henderson, cited by Matthew, J., in the case of The Nobel's Explosives Co. *v.* Jenkins,—"A fair allowance ought to be made for the difficulties in which a master may be involved. * * * The place, the season—the opportunity, and means at hand, the interests of other persons concerned in the adventure, and whom it might be unfair to delay for the sake of the cargo in

peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account." In that case, the learned judge held that any information which had reached the master of the ship could not divest him of his original authority and discretion as agent, in an emergency, for the owners of the ship, and own-
1574 ers of the cargo. The learned proctors for the libelant have in a most learned and interesting manner, discussed the cases cited by them bearing upon this subject; but I think there is nothing further in the cases to which I need call attention.

In the case at bar, there is clearly nothing to change the rule with reference to the duty of the master of this steamship at the time of the emergency in which he was called to act, when he
1575 turned the ship about and proceeded westward. The proofs show, I think, that he acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity. His conduct is justified under the rules laid down in the cases to which I have referred. It is justified, too, by the test of "urgent necessity," and of the "compulsion of necessity," as those tests have
1576 been made by Chief Justice Waite, and Judge Addison Brown, in the cases brought to my attention by the learned proctors for the libelant. If it be assumed, as urged in behalf of the libelant, that the parties made their contract of carriage, on July 27th, in contemplation of the possibility of war, it is clear that they did not make the contract with knowledge of the progress of events during the three days before the vessel was turned about; and it was upon all his knowledge

upon July 31st, and all the information which he then obtained, that the master of the ship based his action. 1577

As he steamed westward, the testimony discloses that he proceeded with care and discretion. He caused the side lights, and the masthead lights to be extinguished; the port holes to be darkened; and the curtains to be drawn down on the promenade deck, to keep the light from shining out of the lounge and smoking room. He painted the tops of the smokestacks black, to make the ship appear to be a White Star boat. From intercepted wireless messages, he had reason to think he had acted wisely in turning about. On August 1st, at 9.40 in the evening, he received a wireless message, sent by way of Sayville, to all ships of the German Society for Wireless Telegraph. The despatch was in the German code, and was thus translated: "Threatening danger of war; do not touch at any port England, France, Russia." On August 3rd, at 1.30 in the afternoon, the English cruiser *Essex* was heard in connection with Halifax by wireless. As the click of the *Essex* became more distinct, indicating her approach towards the *Cecilie*, it became impossible to tell whether or not the British ship was patrolling the coast of Long Island; and it was thought that some other British war vessel might be cruising along the coast in the vicinity of Boston. It appeared to Captain Polack that to approach either New York or Boston might involve danger; he therefore called his officers together for a conference; and it was decided to change the ship's course, to proceed towards the Banks, then run for Frenchman's Bay and put into Bar Harbor. This he did. The ship arrived safely at Bar Harbor on the morning of August 4th, at six o'clock. 1578 1579 1580

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2. Were the managing directors of the North German Lloyd justified in sending the wireless message to the ship,—"War has broken out with England, France and Russia; return to New York"?

Upon this point, the proofs show the progress of events up to the time of turning westward. It
1582 is not necessary to refer in detail to all these events. The stipulation also gives the statement of the directors and officials of the claimant. It appears from that statement that the directors tried to decide what was the latest time the steamship would have to receive a message in regard to the continuation or interruption of her journey; the Lloyd's nautical department reached the conclusion that according to the supply of coal on hand, and the duration of the trip, the board of
1583 directors would have to come to a decision, at the latest, during the early hours of the afternoon of July 31st. It was thought that, owing to the congestion of the cable and wireless connections, some time would elapse from the sending of the wireless message to its reception on the ship. The imminence of war was fully in the minds of the directors. Accordingly they delegated Baron von Plettenberg, a member of their board, to go to Berlin for information. As late
1584 as July 30th there was apparently some hope indulged that war might be averted, but by the evening of that day a general warning was issued to the merchant marine through the Admiralty staff. This warning was apparently the first official sign to the directors that war was inevitable; this caused them to begin to send telegraphic messages to their ships in regard to further procedure. Just before two o'clock, on July 31st,

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Baron von Plettenberg sent telegraphic information that the declaration of a state of war would at once be made public. Later in the afternoon, "the declaration of a state of war for the German Empire,—owing to the threatening danger of war," was brought to the knowledge of the directors. On the basis of this telegraphic advice, the wireless message was sent to Captain 1586
Polack. The decree of a state of war was designated as the decisive fact inducing the directors to send the message which they sent. It appears in the record that a "state of war" means that the country is put upon a war basis, but not that war has actually been declared. It is urged by the learned proctors for the libelant that the message announcing that war had broken out was an untruthful one; that it put a false color upon the matter, and caused the captain of the ship to 1587
deviate from his course, and break his contract, when there was no necessity for such action. The reasons assigned by the directors for saying "War has broken out," instead of "War is imminent," are given as follows:

"The reasons why we stated in our telegram to the *Cecilie* that the war had broken out, whereas, up to that time, as a matter of fact only the proclamation of a state of war, owing to the 1588
threatening danger of war had been issued, are the following:

First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.

Secondly, we stated ourselves, when sending off the telegram that every other information in regard to the political situation, every statement

that was not absolutely clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

The sole information that the state of war had been proclaimed would probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations
1590 of political law.

Only the information that war had already broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

Furthermore we had to count on quite a long
1591 period of transmission for our telegrams, during which time, therefore a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

The wording of our telegram, therefore, occurred purposely in the form that we reported
1592 the war as already having broken out, and has nothing to do with the wording of our telegram code."

The proofs make it clear that the directors knew and realized that war was imminent; that the event would happen which did happen; and that the telegraphic information from Baron von Plettenberg had brought them to that conclusion.

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Their decision was, in my opinion, a reasonable one; they apparently proceeded upon the idea that a mere statement announcing a state of war to have proclaimed, might not convey the full import of the actual imminence of war to Captain Polack, more than a thousand miles away upon the sea. Their conduct indicates that they recognized the necessity of giving the captain of their 1594
steamship something more than an arbitrary order; that they knew the responsibility of turning the ship about was upon him. They could not give him the history of the last three days, upon which their conclusion was based. And, therefore, these directors thought it necessary to translate their knowledge of the impossibility of escape from war into a statement that war had broken out. Under all the circumstances, I am persuaded that their message cannot be held to 1595
have been an untruthful one, in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken. Upon the whole evidence, I am of the opinion that the directors were justified in sending their wireless message. Before Captain Polack received it, the German Emperor had issued his proclamation declaring a state of war in the German Empire. That proclamation was: 1596

"We, William, by the grace of God, German Emperor, King of Prussia, etc., decree by virtue of Art. 68 of the Constitution of the German Empire, in the name of the Empire, the following the Imperial territory, with the exception of the Royal Bavarian Territory, is hereby declared to be in a state of war. This decree goes into effect with its publication."

1597 The general mobilization of the French Army occurred on the following day, August 1st. On the same day, Germany declared war against Russia. The German Ambassador at St. Petersburg by direction of his government, on July 26th, had said: "But mobilization means war; as we know the obligations of France towards Russia, this mobilization would be directed against
1598 both Russia and France." Germany's declaration of war against Russia, might well be thought to be substantially equivalent to a declaration of war against France. On August 3rd a state of war was declared to exist between Germany and France; and the French Ambassador was handed his passports. On August 4th, England declared war against Germany. On August 5th, Austria declared war against Russia.

1599 It is urged on the part of the libelant that if the *Cecilie* had continued on her course, she could have arrived at Plymouth with her cargo of gold; and that the steamship was bound to complete the performance of her contract with the Guaranty Trust Company, even though such completion of the contract involved the certainty, or the overwhelming probability of subsequent capture. The contention is not made that the steamship could have arrived at Bremerhaven until after
1600 the declaration of war against Russia, and after the declaration of war against France. In fact, I believe the learned proctors for the libelant admit the extreme improbability that the steamer could have arrived safely at Bremerhaven. The proofs clearly show that, whether or not the steamship could have arrived safely at Plymouth, it is clear that she could not have arrived at Bremerhaven until after war had been declared;

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and it would have been practically certain that she would have been seized by a hostile force. Under the general scope of his authority, the shipmaster is under the same duty to protect his ship, and the other interests intrusted to his care, as he is to protect his cargo. Those who have committed their interests to him must be presumed to have done so with the knowledge of such duty of the shipmaster, and of the ship. *The Teutonia,* L. R., 4, P. C., 171, *supra;* the *Styria,* 186 U. S., 1, *supra.*

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It is not necessary, however, to decide what would have happened if the steamship had proceeded on her voyage. It is sufficient to say that the claimant's directors acted with a reasonable apprehension of imminent peril, when they sent the wireless message to their captain. They must be judged by the information within their reach at the time of sending the message. When so judged, their conduct must be held to be reasonable and justifiable. In view of my conclusion, I need not consider other questions presented by the pleadings.

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I have already found that, in turning his ship about, the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril; that, in view of his knowledge, and of credible information received by him, he did as a prudent shipmaster should have done.

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I come to this conclusion, without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under the maritime law.

The libel is dismissed, with costs.

1605 *Opinion of the Court.*

No. 1076.

NATIONAL CITY BANK,

vs.

"KRONPRINZESSIN CECILIE."

By the Court.
February 1, 1916.

1606 HALE, District Judge. The libel in this case is the same in principle as that of the Guaranty Trust Company, No. 1,069; the case just considered and decided.

In this case of the National City Bank, there are two alleged causes of action; one with reference to the shipment of twenty-one kegs of gold bullion, of the alleged value $1,061,718.89, to be carried to Plymouth, thence to be forwarded to London, and there delivered to the London City
1607 & Midland Bank, Ltd., in consideration of $1,990.72, prepaid freight. The other cause of action is with reference to a shipment, made at the same time, and on the same steamer, of forty kegs of gold bullion, valued at $2,104,254.34, to be carried to Cherbourg, France; thence to be forwarded to Paris; and there delivered to Credit Lyonnais, in consideration of $2,630.32, prepaid freight.

1608 The libelant demands $404,150.06, damages for failure to deliver the London consignment; and $32,007.43, damages for failure to deliver the Paris consignment; making the damages claimed on this libel $436,157.49. The amended libel increases the claim for damages to $446,828.47. The answer sets up the same defense as in the case already considered. What I have said in the case of the Guaranty Trust Company, applies to this case.

The libel is dismissed, with costs.

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Opinion of the Court.

No. 1070.

CHARLES W. RANTOUL, JR.,

vs.

STEAMSHIP "KRONPRINZESSIN CECILIE."

By the Court.
February 1, 1916.

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HALE, District Judge. In this case the libelant seeks to recover $5,000 for alleged breach of contract in that the steamship failed to carry him to Plymouth, England, as it had agreed to do. The libel is essentially the same as that of the Guaranty Trust Company; except that the cause of action is based on a contract of passage, instead of a bill of lading. But the libel contains nothing tending to show how the damage was sustained, 1611
or upon what basis the amount is demanded. The answer raises substantially the same questions raised by the answer in the case of the Trust Company. What has been said in the case of the Guaranty Trust Company, applies to this case.

Libel is dismissed, with costs.

No. 1075.

MAURICE HANSSENS, 1612

vs.

STEAMSHIP "KRONPRINZESSIN CECILIE."

By the Court.
February 1, 1916.

HALE, District Judge. This libel seeks to recover $200,000, for alleged breach of contract of

the Steamship Company in failing to carry the libelant to Plymouth, England. The allegations are essentially the same as those in the case of Rantoul, No. 1,070, except that this libelant sets up the following method of computing his damages:

"That if the steamship had continued on to
1614 Plymouth the libelant would have been enabled to reach his home in Brussels, Belgium, on August 4th; and that by reason of the breach of contract by the steamer he was prevented from going to Brussels before it was seized and occupied by the German military forces; in consequence whereof he has been deprived of his property and has sustained other damage."

The libelant has, however, subsequently filed
1615 certain amendments alleging that, by reason of the breach of contract, he has sustained damages consisting of loss of his property, loss of passage money paid for himself and his wife, loss of time, inconvenience, and expense of maintenance. The answer is essentially similar to that in the Rantoul case, with the addition that it sets up the fact that the libelant is a subject of the King of Belgium; that the claimant is a German corporation; that Belgium and Germany are at war; and, that,
1616 therefore, this Court, being a Court of a neutral country, should decline to take jurisdiction. Without considering the last defense, it is sufficient to say that what the Court has said in the case of the Guaranty Trust Company, is applicable to this case.

The libel is dismissed, with costs.

DISTRICT COURT OF THE UNITED STATES, 1617

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY OF NEW YORK,
Libelant,

AGAINST

S. S. "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD, 1618
Claimant.

DECREE.

Mar. 22, 1916.

HALE, *J.* This cause having duly come on to be heard, and the libelant having appeared by Messrs. Kirlin, Woolsey & Hickox, J. Parker Kirlin and Charles R. Hickox of counsel, and 1619
the claimant having appeared by Messrs. Choate, Larocque & Mitchell, Joseph Larocque, Walter C. Noyes and Joseph D. Bedle of counsel, and having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had,

Now, on motion of Choate, Larocque & Mitchell, Proctors for the Claimant, it is 1620

ORDERED, ADJUDGED and DECREED that the libel filed in the cause be dismissed with $701.90, costs, to be taxed against the libelant, and

IT IS FURTHER ORDERED that unless an appeal be taken from this decree within the time limited and prescribed by the rules of this court, the claimant's stipulations be cancelled.

By the Court,

WILLIAM NELSON,
Clerk.

1621 DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

CHARLES W. RANTOUL, JR.,
Libelant,

AGAINST

1622 S. S. "KRONPRINZESSIN CECILIE,"
NORTH GERMAN LLOYD,
Claimant.

DECREE.
Mar. 22, 1916.

HALE, *J.* This cause having duly come on to be heard, and the libelant having appeared by Messrs. Kirlin, Woolsey & Hickox, J. Parker
1623 Kirlin and Charles R. Hickox of counsel, and the claimant having appeared by Messrs. Choate, Larocque & Mitchell, Joseph Larocque, Walter C. Noyes and Joseph D. Bedle of Counsel, and having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had,

Now on motion of Choate, Larocque &
1624 Mitchell, proctors for the Claimant, it is

ORDERED, ADJUDGED and DECREED that the libel filed in the cause be dismissed with $30.00 costs, to be taxed against the libelant, and

IT IS FURTHER ORDERED that unless an appeal be taken from this decree within the time limited and prescribed by the rules of this court, the claimant's stipulations be cancelled.

By the Court,

WILLIAM NELSON,
Clerk.

DISTRICT COURT OF THE UNITED STATES, 1625

DISTRICT OF MASSACHUSETTS.

MAURICE HANSSENS,
Libelant,

AGAINST

S. S. "KRONPRINZESSIN CECILIE," 1626
NORTH GERMAN LLOYD,
Claimant.

DECREE.

Mar. 22, 1916.

HALE, *J.* This cause having duly come on to be heard, and the libelant having appeared by Messrs. Kirlin, Woolsey & Hickox, J. Parker Kirlin and Charles R. Hickox of counsel, and 1627 the claimant having appeared by Messrs. Choate, Larocque & Mitchell, Joseph Larocque, Walter C. Noyes and Joseph D. Bedle of Counsel, and having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had,

Now on motion of Choate, Larocque & Mitchell, proctors for the Claimant, it is 1628

ORDERED, ADJUDGED and DECREED that the libel filed in the cause be dismissed with $35.00 costs, to be taxed against the libelant, and

IT IS FURTHER ORDERED that unless an appeal be taken from this decree within the time limited and prescribed by the rules of this court, the claimant's stipulations be cancelled.

By the Court,

WILLIAM NELSON,
Clerk.

1629 DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF MASSACHUSETTS.

NATIONAL CITY BANK OF NEW YORK,
Libellant,

AGAINST

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S. S. "KRONPRINZESSIN CECILIE,"
NORTH GERMAN LLOYD,
Claimant.

DECREE.

Mar. 22, 1916.

HALE, *J.* This cause having duly come on to be heard, and the libellant having appeared by
1631 Messrs. Shearman & Sterling, James M. Beck of Counsel, and the claimant having appeared by Messrs. Choate, Larocque & Mitchell, Joseph Larocque, Walter C. Noyes and Joseph D. Bedle of Counsel, and having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had,

Now on motion of Choate, Larocque &
1632 Mitchell, Proctors for the Claimant, it is

ORDERED, ADJUDGED and DECREED that the libel filed in the cause be dismissed with $30.00 costs, to be taxed against the libellant, and

IT IS FURTHER ORDERED that unless an appeal be taken from this decree within the time limited and prescribed by the rules of this court, the claimant's stipulations be cancelled.

By the Court,

WILLIAM NELSON,
Clerk.

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

1633

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

GUARANTY TRUST COMPANY OF NEW YORK, Libelant,	1634
AGAINST	No. 1069.
STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD, Claimant.	

The libelant assigns error to the final decision and decree of the District Court in the following respects: 1635

FIRST.—The Court failed to find that the message sent by the directors of the North German Lloyds to the master, July 31st, was intentionally false.

SECOND.—The Court found: "I am persuaded that their message cannot be held to have been an untruthful one in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken." 1636

THIRD.—The Court found: "Upon the whole evidence I am of the opinion that the directors were justified in sending their wireless message."

FOURTH.—The Court found: "The proofs make it clear that the directors knew and realized that war was imminent."

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FIFTH.—The Court found that a general warning issued to the merchant marine through the admiralty staff was an official sign to the directors of the North German Lloyd that war was inevitable.

SIXTH.—The Court found: "In fact I believe the learned proctors for the libelant admit the extreme improbability that the steamer could have arrived safely at Bremerhaven."

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SEVENTH.—The Court found that when the master "received his message on the evening of July 31st he acted not only in accordance with his instructions but in accordance with the dictates of his own best judgment."

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EIGHTH.—The Court found that the facts within the master's knowledge "tended to the conclusion that his country was upon the very edge of war with Russia, France and England."

NINTH.—The Court found that the master "received credible information that if he continued in the direct course of his voyage his ship would be exposed to an imminent peril."

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TENTH.—The Court found that "upon the information which Captain Polack received and the facts within his knowledge, he acted, I think, with a reasonable apprehension of impending danger."

ELEVENTH.—The Court found that the master "was justified in deviating from his direct course Eastward; and in doing this he was acting with a due regard for the safety of his ship,

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his passengers and his cargo. In the light of what he knew, his clear duty was to turn about at the time he did."

TWELFTH.—The Court found that the directors in their message to the master "showed that they still relied upon his discretion."

THIRTEENTH.—The Court found that the mas- 1642
ter's instructions did not subtract anything from his duty.

FOURTEENTH.—The Court found that so far as the shippers and passengers were concerned the master was under the duty to act upon his own judgment.

FIFTEENTH.—The Court found that as a prin- 1643
ciple of law a master "is justified in deviating from his direct course when in reasonable apprehension of imminent peril."

SIXTEENTH.—The Court found: "In the case at bar there is clearly nothing to change the rule with reference to the duty of the master of this steamship at the time of the emergency in which he was called to act when he turned the ship about and proceeded westward." 1644

SEVENTEENTH.—The Court found: "The proofs show, I think, that he acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity."

EIGHTEENTH.—The Court found that the master's conduct was justified under the rules laid down in the cases referred to by the Court.

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NINETEENTH.—The Court found that "it was upon all his knowledge upon July 31st, and all the information which he then obtained that the master of the ship based his action."

TWENTIETH.—The Court failed to find that the master acted solely in response to the order received by him from the directors of the Line and that he did not assume to exercise any discretion of his own.

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TWENTY-FIRST.—The Court found that "in turning his ship about the master acted with due regard to the safety of all interests entrusted to him and under a reasonable apprehension of imminent peril; that in view of his knowledge and of credible information received by him he did as a prudent shipmaster should have done."

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TWENTY-SECOND.—The Court found that it came to a conclusion "without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under the maritime law."

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TWENTY-THIRD.—The Court failed to find that the steamship, as common carrier, having accepted the libelant's gold for transportation and delivery in England, was liable as an insurer to make delivery in England unless excused by the terms of the bill of lading.

TWENTY-FOURTH.—The Court failed to find that there was not any arrest and restraint of

princes exerted against the vessel within the terms of the bill of lading.

TWENTY-FIFTH.—The Court failed to find that there was not any peril from a cause excepted by the bill of lading or otherwise that justified the master in turning back to New York, when and as he did so.

TWENTY-SIXTH.—The Court failed to find that in any event the libelant was entitled to a return of the prepaid freight.

TWENTY-SEVENTH.—The Court failed to enter a decree in favor of the libelant.

TWENTY-EIGHTH.—The Court dismissed the libel with costs.

For these reasons the Petitioner appeals from the final decision of this Court and from the final decree entered herein on March 22, 1916, and from each and every part thereof to the United States Circuit Court of Appeals for the First Circuit, and prays that its appeal may be allowed.

Dated, April 11, 1916.

GUARANTY TRUST COMPANY OF NEW YORK,
By KIRLIN, WOOLSEY & HICKOX,
BLODGETT JONES BURNHAM & BINGHAM,
Proctors.

Appeal allowed, April , 1916.

CLARENCE HALE,
U. S. District Judge.

1653

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

CHARLES W. RANTOUL, JR., Libelant,	
1654 AGAINST	No. 1070.
STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD, Claimant.	

1655 The libelant assigns error to the final decision and decree of the District Court in the following respects:

FIRST.—The Court failed to find that the message sent by the directors of the North German Lloyd to the master, July 31st, was intentionally false.

SECOND.—The Court found: "I am persuaded that their message cannot be held to have been
1656 an untruthful one in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken."

THIRD.—The Court found: "Upon the whole evidence I am of the opinion that the directors were justified in sending their wireless message."

FOURTH.—The Court found: "The proofs make it clear that the directors knew and realized that war was imminent."

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FIFTH.—The Court found that a general warning issued to the merchant marine through the admiralty staff was an official sign to the directors of the North German Lloyd that war was inevitable.

SIXTH.—The Court found: "In fact I believe the learned proctors for the libelant admit the extreme improbability that the steamer could have arrived safely at Bremerhaven."

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SEVENTH.—The Court found that when the master "received his message on the evening of July 31st he acted not only in accordance with his instructions but in accordance with the dictates of his own best judgment."

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EIGHTH.—The Court found that the facts within the master's knowledge "tended to the conclusion that his country was upon the very edge of war with Russia, France and England."

NINTH.—The Court found that the master "received credible information that if he continued in the direct course of his voyage his ship would be exposed to an imminent peril."

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TENTH.—The Court found that "upon the information which Captain Polack received and the facts within his knowledge, he acted, I think, with a reasonable apprehension of impending danger."

ELEVENTH.—The Court found the master "was justified in deviating from his direct course Eastward; and in doing this he was acting with a due regard for the safety of his ship, his passengers

and his cargo. In the light of what he knew, his clear duty was to turn about at the time he did."

TWELFTH.—The Court found that the directors in their message to the master "showed that they still relied upon his discretion."

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THIRTEENTH.—The Court found the master's instructions did not subtract anything from his duty.

FOURTEENTH.—The Court found that so far as the shippers and passengers were concerned the master was under the duty to act upon his own judgment.

1663 FIFTEENTH.—The Court found that as a principle of law a master "is justified in deviating from his direct course when in reasonable apprehension of imminent peril."

SIXTEENTH.—The Court found: "In the case at bar there is clearly nothing to change the rule with reference to the duty of the master of this steamship at the time of the emergency in which he was called to act when he turned
1664 the ship about and proceeded westward."

SEVENTEENTH.—The Court found: "The proofs show, I think, that he acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity."

EIGHTEENTH.—The Court found that the mas-

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ter's conduct was justified under the rules laid down in the cases referred to by the Court.

NINETEENTH.—The Court found that "it was upon all his knowledge upon July 31st, and all the information which he then obtained that the master of the ship based his action."

1666

TWENTIETH.—The Court failed to find that the master acted solely in response to the order received by him from the directors of the Line and that he did not assume to exercise any discretion of his own.

TWENTY-FIRST.—The Court found that "in turning his ship about the master acted with due regard to the safety of all interests entrusted to him and under a reasonable apprehension of imminent peril; that in view of his knowledge and of credible information received by him he did as a prudent shipmaster should have done."

1667

TWENTY-SECOND.—The Court found that "the master was justified in his action by the duty imposed upon him under the maritime law."

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TWENTY-THIRD.—The Court failed to find that the steamship, as common carrier, having accepted the libelant as a passenger for transportation and delivery in England, was liable as an insurer to make delivery in England unless excused by the terms of its contract.

TWENTY-FOURTH.—The Court failed to find that there was not any cause that justified

1669 *Petition for Appeal and Assignment of Errors.*

the master in turning back to New York, when and as he did so.

TWENTY-FIFTH.—The Court failed to enter a decree in favor of the libelant.

TWENTY-SIXTH.—The Court dismissed the libel with costs.

1670

For these reasons the Petitioner appeals from the final decision of this Court and from the final decree entered herein on March 22, 1916, and from each and every part thereof to the United States Circuit Court of Appeals for the First Circuit, and prays that its appeal may be allowed.

Dated, April 11, 1916.

1671

CHARLES W. RANTOUL, JR.,
By KIRLIN, WOOLSEY & HICKOX,
BLODGETT JONES BURNHAM & BINGHAM,
Proctors.

Appeal allowed, April , 1916.

CLARENCE HALE,
U. S. District Judge.

1672

PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

1673

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

MAURICE HANSSENS,
Libelant,

AGAINST

STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD,
Claimant.

1674

No. 1075.

The libelant assigns error to the final decision and decree of the District Court in the following respects: 1675

FIRST.—The Court failed to find that the message sent by the directors of the North German Lloyds to the master, July 31st, was intentionally false.

SECOND.—The Court found: "I am persuaded that their message cannot be held to have been an untruthful one in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken." 1676

THIRD.—The Court found: "Upon the whole evidence I am of the opinion that the directors were justified in sending their wireless message."

FOURTH.—The Court found: "The proofs make it clear that the directors knew and realized that war was imminent."

FIFTH.—The Court found that a general warning issued to the merchant marine through the admiralty staff was an official sign to the directors of the North German Lloyd that war was inevitable.

SIXTH.—The Court found: "In fact I believe the
1678 learned proctors for the libelant admit the extreme improbability that the steamer could have arrived safely at Bremerhaven."

SEVENTH.—The Court found that when the master "received his message on the evening of July 31st he acted not only in accordance with his instructions but in accordance with the dictates of his own best judgment."

1679 EIGHTH.—The Court found that the facts within the master's knowledge "tended to the conclusion that his country was upon the very edge of war with Russia, France and England."

NINTH.—The Court found that the master "received credible information that if he continued in the direct course of his voyage his ship would be exposed to an imminent peril."

1680 TENTH.—The Court found that "upon the information which Captain Polack received and the facts within his knowledge, he acted, I think, with a reasonable apprehension of impending danger."

ELEVENTH.—The Court found that the master "was justified in deviating from his direct course Eastward; and in doing this he was acting with a due regard for the safety of his ship,

his passengers and his cargo. In the light of what he knew, his clear duty was to turn about at the time he did."

TWELFTH.—The Court found that the directors in their message to the master "showed that they still relied upon his discretion."

THIRTEENTH.—The Court found that the mas- 1682
ter's instructions did not subtract anything from his duty.

FOURTEENTH.—The Court found that so far as the shippers and passengers were concerned the master was under the duty to act upon his own judgment.

FIFTEENTH.—The Court found that as a prin- 1683
ciple of law a master "is justified in deviating from his direct course when in reasonable apprehension of imminent peril."

SIXTEENTH.—The Court found: "In the case at bar there is clearly nothing to change the rule with reference to the duty of the master of this steamship at the time of the emergency in which he was called to act when he turned the ship about and proceeded westward." 1684

SEVENTEENTH.—The Court found: "The proofs show, I think, that he acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity."

EIGHTEENTH.—The Court found that the master's conduct was justified under the rules laid down in the cases referred to by the Court.

1685

NINETEENTH.—The Court found that "it was upon all his knowledge upon July 31st, and all the information which he then obtained that the master of the ship based his action."

TWENTIETH.—The Court failed to find that the master acted solely in response to the order received by him from the directors of the
1686 Line and that he did not assume to exercise any discretion of his own.

TWENTY-FIRST.—The Court found that "in turning his ship about the master acted with due regard to the safety of all interests entrusted to him and under a reasonable apprehension of imminent peril; that in view of his knowledge and of credible information re-
1687 ceived by him he did as a prudent shipmaster should have done."

TWENTY-SECOND.—The Court found that "the master was justified in his action by the duty imposed upon him under the maritime law."

TWENTY-THIRD.—The Court failed to find that the steamship, as common carrier, having ac-
1688 cepted the libelant as a passenger for transportation and delivery in England, was liable as an insurer to make delivery in England unless excused by the terms of its contract.

TWENTY-FOURTH.—The Court failed to find that there was not any cause that justified the master in turning back to New York, when and as he did so.

TWENTY-FIFTH.—The Court failed to enter a decree in favor of the libelant.

TWENTY-SIXTH.—The Court dismissed the libel with costs.

For these reasons the Petitioner appeals from the final decision of this Court and from the final decree entered herein on March 22, 1916, and from each and every part thereof to the United States Circuit Court of Appeals for the First Circuit, and prays that its appeal may be allowed.

Dated, April 11, 1916.

MAURICE HANSSENS,
By KIRLIN, WOOLSEY & HICKOX,
BLODGETT JONES BURNHAM & BINGHAM,
Proctors.

Appeal allowed, April , 1916.

CLARENCE HALE,
U. S. District Judge.

1693 PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS.

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

THE NATIONAL CITY BANK OF NEW YORK, Libelant,	
1694 AGAINST	No. 1076.
STEAMSHIP "KRONPRINZESSIN CECILIE," NORTH GERMAN LLOYD, Claimant.	

1695 The libelant assigns error to the final decision and decree of the District Court in the following respects:

FIRST.—The Court failed to find that the message sent by the directors of the North German Lloyd to the master, July 31st, was intentionally false.

SECOND.—The Court found: "I am persuaded that their message cannot be held to have been
1696 an untruthful one in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken."

THIRD.—The Court found: "Upon the whole evidence I am of the opinion that the directors were justified in sending their wireless message."

FOURTH.—The Court found: "The proofs make it clear that the directors knew and realized that war was imminent."

FIFTH.—The Court found that a general warning issued to the merchant marine through the admiralty staff was an official sign to the directors of the North German Lloyd that war was inevitable.

SIXTH.—The Court found: "In fact I believe the learned proctors for the libelant admit the extreme improbability that the steamer could have arrived safely at Bremerhaven."

SEVENTH.—The Court found that when the master "received his message on the evening of July 31st he acted not only in accordance with his instructions, but in accordance with the dictates of his own best judgment."

EIGHTH.—The Court found that the facts within the master's knowledge "tended to the conclusion that his country was upon the very edge of war with Russia, France and England."

NINTH.—The Court found that the master "received credible information that if he continued in the direct course of his voyage his ship would be exposed to an imminent peril."

TENTH.—The Court found that "upon the information which Captain Polack received and the facts within his knowledge he acted, I think, with a reasonable apprehension of impending danger."

1701 ELEVENTH.—The Court found the master "was justified in deviating from his direct course Eastward; and in doing this he was acting with a due regard for the safety of his ship, his passengers and his cargo. In the light of what he knew, his clear duty was to turn about at the time he did."

1702 TWELFTH.—The Court found that the directors in their message to the master "showed that they still relied upon his discretion."

THIRTEENTH.—The Court found the master's instructions did not subtract anything from his duty.

FOURTEENTH.—The Court found that so far
1703 as the shippers and passengers were concerned the master was under the duty to act upon his own judgment.

FIFTEENTH.—The Court found that as a principle of law a master "is justified in deviating from his direct course when in reasonable apprehension of imminent peril."

SIXTEENTH.—The Court found: "In the case
1704 at bar there is clearly nothing to change the rule with reference to the duty of the master of this steamship at the time of the emergency in which he was called to act when he turned the ship about and proceeded Westward."

SEVENTEENTH.—The Court found: "The proofs show, I think, that he acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of [illegible]n prudence and sagacity."

EIGHTEENTH.—The Court found that the master's conduct was justified under the rules laid down in the cases referred to by the Court. 1705

NINETEENTH.—The Court found that "it was upon all his knowledge upon July 31st, and all the information which he then obtained that the master of the ship based his action."

TWENTIETH.—The Court failed to find that the master acted solely in response to the order received by him from the directors of the Line and that he did not assume to exercise any discretion of his own. 1706

TWENTY-FIRST.—The Court found that "in turning his ship about the master acted with due regard to the safety of all interests entrusted to him and under a reasonable apprehension of imminent peril; that in view of his knowledge and of credible information received by him he did as a prudent shipmaster should have done." 1707

TWENTY-SECOND.—The Court found that it came to a conclusion "without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under the maritime law." 1708

TWENTY-THIRD.—The Court failed to find that the steamship, as common carrier, having accepted the libelant's gold for transportation and delivery in England and France was liable as an insurer to make delivery in England and France unless excused by the terms of the bill of lading.

1709 *Petition for Appeal and Assignment of Errors.*

TWENTY-FOURTH.—The Court failed to find that there was not any arrest and restraint of princes exerted against the vessel within the terms of the bill of lading.

TWENTY-FIFTH.—The Court failed to find that there was not any peril from a cause excepted by the bill of lading or otherwise that justified
1710 the master in turning back to New York, when and as he did so.

TWENTY-SIXTH.—The Court failed to find that in any event the libelant was entitled to a return of the prepaid freight.

TWENTY-SEVENTH.—The Court failed to enter a decree in favor of the libelant.

1711

TWENTY-EIGHTH.—The Court dismissed the libel with costs.

For these reasons the Petitioner appeals from the final decision of this Court and from the final decree entered herein on March 22, 1916, and from each and every part thereof to the United States Circuit Court of Appeals for the First Circuit, and prays that its appeal may
1712 be allowed.

Dated, April 11, 1916.

THE NATIONAL CITY BANK OF NEW YORK,,
By SHEARMAN & STERLING,
BLODGETT JONES BURNHAM & BINGHAM,
Proctors.

Appeal allowed, April , 1916.
CLARENCE HALE,
U. S. District Judge.

AGREEMENT AS TO RECORD ON APPEAL. 1713

It is hereby agreed that the foregoing, being all the testimony and exhibits offered upon the trial in the District Court, shall constitute the record on appeal in the above-entitled cause, and need not be certified by the clerk of the District Court except as an agreed record.

KIRLIN, WOOLSEY & HICKOX,
BLODGETT JONES BURNHAM & BINGHAM,
Proctors for Appellants, Guaranty Trust Company of New York, Charles W. Rantoul, Jr. and Maurice Hanssens. 1714

SHEARMAN & STERLING,
BLODGETT JONES BURNHAM & BINGHAM,
Proctors for Appellant, National City Bank of New York.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Appellee. 1715

ORDER OF THE COURT AS TO RECORD ON APPEAL.

Hale, *J.* In the above entitled causes, all parties agreeing thereto, it is ORDERED that the record annexed hereto shall constitute the record on appeal, and that the clerk shall certify it as an appeal record without examining it and without charge, except such as may be lawfully made for the certificate itself. 1716

1717 CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Massachusetts, } ss.:

I, WILLIAM NELSON, Clerk of the District Court of the United States, within and for the District of Massachusetts, certify that the foregoing is the record agreed upon between the parties as the appeal record in the causes in Admiralty, in said District Court, determined,
1718 entitled, *Guaranty Trust Company of New York* v. *Steamship Kronprinzessin Cecilie*, No. 1069; *Charles W. Rantoul, Jr.*, v. *Steamship Kronprinzessin Cecilie*, No. 1070; *Maurice Hanssens* v. *Steamship Kronprinzessin Cecilie*, No. 1075; and *National City Bank of New York* v. *Steamship Kronprinzessin Cecilie*, No. 1076, said agreement and order of court thereon.

1719 IN TESTIMONY WHEREOF, I hereunto [SEAL] set my hand and affix the seal of said District Court, at in said district, this day of April, A. D., 1916.

WILLIAM NELSON,
Clerk.

1720

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To NORTH GERMAN LLOYD, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the nineteenth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Guaranty Trust Company of New York is appellant, and you are appellee, to show cause, if any there be, why the said decree entered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable CLARENCE HALE, United States District Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twentieth day of April, in the year of our Lord one thousand nine hundred and sixteen.

CLARENCE HALE,
U. S. District Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION.

Due and sufficient service of the within citation is hereby acknowledged.

CHOATE, LAROCQUE & MITCHELL,
Proctors for NORTH GERMAN LLOYD.

APRIL 22, 1916.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To NORTH GERMAN LLOYD, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the nineteenth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Charles W. Rantoul, Jr., is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable CLARENCE HALE, United States District Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twentieth day of April, in the year of our Lord one thousand nine hundred and sixteen.

CLARENCE HALE,
U. S. District Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION.

Due and sufficient service of the within citation is hereby acknowledged.

CHOATE, LAROCQUE & MITCHELL,
Proctors for NORTH GERMAN LLOYD.

APRIL 22, 1916.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To NORTH GERMAN LLOYD, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the nineteenth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Maurice Hanssens is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable CLARENCE HALE, United States District Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twentieth day of April, in the year of our Lord one thousand nine hundred and sixteen.

CLARENCE HALE,
U. S. District Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION.

Due and sufficient service of the within citation is hereby acknowledged.

CHOATE, LAROCQUE & MITCHELL,
Proctors for NORTH GERMAN LLOYD.

APRIL 22, 1916.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To NORTH GERMAN LLOYD, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the nineteenth day of May next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein The National City Bank of New York is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable CLARENCE HALE, United States District Judge, duly assigned to hold the District Court of the United States for the District of Massachusetts, this twentieth day of April, in the year of our Lord one thousand nine hundred and sixteen.

CLARENCE HALE,
U. S. District Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION.

Due and sufficient service of the within citation is hereby acknowledged.

CHOATE, LAROCQUE & MITCHELL,
Proctors for NORTH GERMAN LLOYD.

APRIL 22, 1916.

United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1196.

STEAMSHIP KRONPRINZESSIN CECILIE.

GUARANTY TRUST COMPANY OF NEW YORK, Libellant, Appellant,

v.

NORTH GERMAN LLOYD, Claimant, Appellee.

No. 1197.

CHARLES W. RANTOUL, JR.

v.

SAME.

No. 1198.

MAURICE HANSSENS

v.

SAME.

No. 1199.

NATIONAL CITY BANK OF NEW YORK

v.

SAME.

Appeals from the District Court of the United States for the District of Massachusetts.

Before Putnam, Dodge, and Bingham, JJ.

November 17, 1916.

DODGE, *J.*:

The careful and detailed statement of the material facts involved in these cases which is found in the opinion of the District Court (228 F. R. 946) will render direct reference unnecessary to the evidence in the record, except in a few instances. As to the facts there is little or no controversy.

1. From Bremen, the home port of this German steamship and her ultimate port of destination on the voyage here in question, her owner, a German corporation, sent a wireless message to her master

on July 31, 1914, at 2.45 p. m. This message he received on board the ship, at sea, at 10 p. m., on the same day, by the ship's time, — 11.45 p. m. by Greenwich time. The message consisted of the peremptory order, "Turn back to New York," prefaced by the statement, "War has broken out with England, France, Russia." This statement meant, as is not disputed, and it was understood by the master to mean, that war had actually broken out between Germany and each of the other countries named. Neither at the time it was sent nor at the time it was received was the statement true as to either of said countries. Not only had no war been declared between Germany and any of them, but no actual state of war existed between Germany and any one of them. It was not until midnight on the same day that Germany notified Russia that she would mobilize unless Russia demobilized within twelve hours, and not until 7 p. m. on the next day that war between Germany and Russia was declared; nor did that declaration make it certain that France or England would be involved.

When the master received the above message, his ship had considerably more than half completed her voyage from New York towards Plymouth in England and thence to Cherbourg in France, the ports at which delivery of the specie shipments on board her had been undertaken according to the bills of lading given for them at New York on July 27. She was a little more than 1,000 miles from Plymouth, the nearer of the two. The message was sent and received in a form such as prevented its above meaning from becoming known to any one but the master, and permitted such meaning to be ascertained by him only through the use of means long before carefully prepared, to be availed of in case the emergency indicated should occur, and kept on board the ship under seal for two years, the seal to be broken by the master only in case he received a message of the character given this message in its untranslated form.

The master obeyed the order to turn back instantly, before revealing the substance of the message to any other person on board. Nine minutes after its receipt the ship was headed for New York instead of for Plymouth, and the voyage undertaken by the bills of lading had been abandoned. Not until after this had been done did the master inform the subordinate officers and the cabin passengers that he had done it.

A master is ordinarily the owner's representative for the purpose of effecting the safe carriage and delivery undertaken by the ship, and as such a stranger to the cargo. But circumstances of unexpected emergency may without doubt occur during a voyage, such as will change his ordinary relations towards ship and cargo; and, because a discretion must needs be exercised in order to avert or minimize extraordinary peril, threatening all the interests concerned, will make him, for the purpose of exercising it, the common representative of all said interests alike. Though a measure adopted by him in the exercise of a discretion so required of him would otherwise be in violation of pending contracts of affreightment, the consent of all concerned will be implied from the fact that in adopting it he has acted as the representative as much of one interest as of

any other, and neither will have the right to complain of it as a breach of contract. In the opinion of the District Court the turning back of this ship as above was a discretionary measure taken by the master under circumstances of the kind above referred to, and therefore leaving the owners of these three shipments of specie no right to complain of it as a breach of the contract to deliver their specie at Plymouth or Cherbourg.

The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back; and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained. As to the circumstances present to the master's mind, it is not contended that he would have turned back except for the message received from the owner, and so far as the message conveyed to him an untrue statement of facts, it can have no weight in this connection. Whether or not actually existing circumstances are shown which would have justified abandonment of the voyage is further considered below. But that any actual exercise of discretion by the master has been shown, in the sense necessary for the application of the above principles, I am in any case unable to believe.

The owner's direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. Whether or not, as between him and the owner, disobedience might have been excused by the presence of circumstances then known to the master but necessarily unknown to the owner, such as made obedience inexpedient, need not be considered, there being no suggestion that there were any such circumstances. If this was the case, no responsibility for results caused by obedience to the order could fall upon the master. By assuming to direct from Bremen, as it did, the course which the ship should take, her owner assumed, for itself and its ship, all such responsibility and lost all right to charge the master with any share thereof.

It is said that the owner's message was not a mere order, but informed the master also of facts for his guidance, indicating that the owner still relied upon his discretion, not expecting unreasoning obedience. It is said further that the master turned back not only in compliance with the owner's direction to do so, but in accordance as well with the dictates of his own prudence and sagacity, i. e., in the exercise of his discretion as master under an emergency.

But this requires, in my opinion, a view not justified by the evidence both of the character of the message itself and of the master's action upon it. The statement of facts contained in the message, if true, would have of itself required abandonment of the voyage to Plymouth and Cherbourg; and no independent judgment as to its truth by the master was possible. There can be no doubt that the owner meant him to act upon it as if it were true. Coupled as it was in the message with the unqualified order to turn back, I can see no reason to doubt that the instant obedience given that order by the master was the only course really left open to him or intended to be left open to him by the message; there being, as has been stated, no

suggestion of any reasons against turning back which the owner could not itself have already considered, and might therefore have demanded an independent judgment on the master's part.

That the above was the view taken at the time by the master himself appears from the terms of the first communication from him to the owner after July 31, i. e., his report in writing to the owner from Bar Harbor dated August 21, 1916. This was sent seventeen days after his arrival there on August 4, and two months before the first of these libels was filed. In it, after stating the latitude and longitude reached upon the voyage from New York at the time the owner's message of July 31 was received, he said,—

"Here we received the order to return, which was immediately carried out."

And thereafter, describing his announcement to the passengers, made as soon as the ship was on her course to the westward, he said,—

"I went down and acquainted them with the fact that war had broken out and that I had received orders from the company to return to New York."

Nowhere in this report is any suggestion found that any alternative to compliance with the order was ever present to the master's mind.

In the master's testimony at the trial, given March 31, 1915, which impresses me, as it did the District Court, with its apparent truthfulness, he stated in direct examination that after receipt of the owner's message "there was only one way to do, to go back to the United States"; and in cross-examination, that as the message read, "War had broken out," etc., "there was only this way to take." It is true that he also stated that this seemed to him the best and only course to pursue, aside from the order given in the message, in view of the stock of coal on board, which might not be enough to get him back to New York unless he turned at once. It is true that he declined to say that the message had relieved him from all further responsibility with respect to the course of the voyage, and did say that it was left in his discretion to do what he chose—"if, for instance, he had not coal enough to return to America." He admitted, however, that, sufficient fuel being on board, as in fact there was, he had to turn back as ordered.

If there is any sense in which the master's act in turning back can be called discretionary with him, the above testimony from him seems to forbid any other conclusion than that such discretion as he may have used was directed and controlled by one only of the interests concerned in a degree altogether too great to permit saying that it was discretion exercised by a common representative of all. Suggestions, or even directions, from owners to their master on a voyage, in an emergency, may not in all cases prevent his determination from being regarded as an exercise of such discretion; but it cannot justly be so regarded when all responsibility for it has been virtually assumed by the owner, as here, and no real scope

for choice in the matter left with the master. If, therefore, the abandonment of the contracts undertaken by these bills of lading can be justified at all, it must be justified as the owner's act; and the question is whether or not circumstances are shown which excused non-fulfillment on the owner's part.

2. The only exception contained in the contracts for delivery of the specie which is relied on for the purpose of exonerating the owner, is the agreement that there shall be no liability for loss or damage occasioned by "arrest and restraint of princes, rulers or people." The shippers of the specie insist on the literal wording, but the construction contended for by the owner, according to which the clause is to have the same effect as if it read, "arrest or restraint," is regarded as more reasonable and as proper.

There having been no actual arrest or restraint of the kind referred to, the owner's act in ordering the ship's return to New York is justifiable, if at all, only by proof that there was at the time ground for apprehending actual arrest or restraint unless she so returned, such as the law of carriage by sea recognizes as the equivalent of actual arrest or restraint. The question is whether or not the requisite proof has been made in this case.

It may be taken for granted that when it has become plainly obvious that continuance of the voyage must necessarily involve arrest or restraint, and can have no other result, such departure from the voyage as is necessary to avoid the danger is not only permissible, but is required of the vessel. She must do what is needful for the purpose of avoiding any actual and presently imminent danger, instead of adhering to a course which can only carry her directly into it. But the evidence here relied on, as will appear, is far from showing the existence of any such situation. What is relied on is, at most, the desirability of keeping the ship out of reach of a future, contingent danger.

The phrase here in question, or some substantial equivalent thereof, has long been familiar in charter-parties, bills of lading and policies of marine insurance. When "arrest and restraint, etc.," is a risk assumed by a marine policy, there must be proof, in order to justify abandonment to the insurer and maintain thereupon a claim for constructive total loss, that arrest or restraint, etc., was the proximate cause of the abandonment and loss. The peril must operate upon the subject of insurance directly, not circuitously. If there has not in fact been actual arrest or restraint, etc., a loss because of apprehension thereof is not within the policy unless the apprehension is shown to have been warranted by actual and immediate danger, apparently inevitable and morally certain. This may be regarded as settled by the decisions both in England and the United States; as is hardly disputed on the owner's behalf. Its contention is that a different rule of construction applies in cases arising upon bills of lading, and, in substance, that in such cases apprehension of capture or detention by a hostile power will excuse non-delivery under the exception here relied on, even though no such actual and immediate danger thereof existed, provided that the apprehension was on the whole reasonable.

This exception, like the others wherewith it is usually associated in such documents, is a term introduced into the contract by and for the benefit of the carrier, and therefore to be construed most strongly against the carrier, according to well-settled principles. If another of the exceptions commonly accompanying it, viz., "perils of the seas," means the same, except as regards negligence of master and crew, in a bill of lading as in a marine policy (The G. R. Booth, 171 U. S. 450, 459; The Xantho, L. R. 12 App. Cas. 503, 510, 517; Hamilton v. Pandorf, do. 518, 526), it is not easy to find sufficient ground for assigning to the words in question, when used in a bill of lading, a meaning broader than that to which their recognized construction, when used in policies of insurance, confines them.

Other stipulations found in the same contract may of course enlarge the scope of the carrier's exemption from liability beyond that permitted by these words alone. But nothing of this kind is found in these bills of lading. No charter-party is here involved. The ship was a common carrier, and by the terms of the bills of lading the full common carrier's liability for delivery of the specie at the agreed ports had been assumed; qualified only, so far as this case is concerned, by the above exception. There was no stipulation that the agreed ports of delivery should be safe, nor any express reservation of any right to deal with the specie otherwise than as promised by the bills of lading if in the master judgment they should become unsafe. There were stipulations of this kind in the contracts under consideration in the cases here most relied on by the shipowner, viz.: The Styria, 188 U. S. 1; Nobel's Explosives Co. v. Jenkins, L. R. (1896), 2 Q. B. 326; The Teutonia, L. R. 4 P. C. 171; The Express, L. R. 3 A. & E. 597. No sufficient warrant is found in them for the claim that the recognized construction in insurance cases is inapplicable to the exception relied on in the present case.

That the arrest or restraint which will excuse failure to make the delivery undertaken by a contract of affreightment unqualified except as in these bills of lading must be an actual and operative restraint, and that no merely expected and contingent restraint affords sufficient excuse, has been settled law at least since Atkinson v. Ritchie, 10 East, 530. If, as in that case, an embargo laid by the country of the port where the cargo was to be shipped is relied on, reasonable apprehension that such embargo will be laid does not excuse the carrier, when in fact it was not laid. If, as in Brunner v. Webster, 5 Com. Cas. 167, sanitary regulations forbidding discharge at the port of delivery are relied on, such regulations must have been in force at the probable time of delivery; a justifiable belief that they would be in force, if mistaken, will not be enough to bring the failure to deliver within the exception.

If, as was done in Balfour et al. v. Portland, etc. Co., 167 F. R. 1010, by the District Court in Oregon, the attending and existing circumstances at the time these contracts of affreightment were made be examined in order to determine the meaning presumably intended by both parties to be put upon this exception, no sufficient reason

for making it include a merely apprehended danger of capture or detention not present or imminent can be found.

On July 31, 1914, when the owner abandoned the voyage, there was, no doubt, danger that an actual state of war would arise whose existence would make Plymouth and Cherbourg hostile ports as regarded the vessel. But this was not a danger arising after the voyage had begun, there was danger that just such a war would arise when the bills of lading were given, four days before, on July 27. That this very danger was then present to the minds of both parties to these contracts of affreightment is not and could not be disputed. The ship was capable of being used as a vessel of war by the German Government, and liable to be taken and used by it as such if within its actual control; a fact which made her more liable than an ordinary German merchant vessel to arrest or capture by either England or France as soon as the apprehended state of war should exist. This fact also must, we think, be regarded as present to the minds of both parties to the above contracts. Yet the owner of the vessel, with the above situation in view, undertook delivery of the specie at Plymouth and Cherbourg, under contracts which reserved to it no right to abandon or vary the voyage should those ports become unsafe, but which made it, according to principles long settled and universally understood, insure the delivery as agreed unless "arrest or restraint of princes," etc., should prevent. It appears that the specie might at the time have been shipped on British or French vessels from New York for the above ports, as to which said ports would not have become hostile in event of war; and that it was shipped on this German vessel in order to take advantage of her greater speed. I find nothing in any of these circumstances tending to warrant a construction of the exception under consideration in the shipowner's favor. Whether the danger of war would increase or diminish during the five or six days necessary to get the specie delivered according to the bills of lading, neither party can be said to have known; but the owner deliberately took the risk that the danger might increase, and cannot, therefore, in justice to the shippers, without proof that the only exception relied on operated to prevent delivery in the accepted meaning of its terms, be permitted to abandon the attempt to deliver without paying such damages as were thereby sustained.

An actual state of war, arising either before or after the voyage contracted for has begun, whereby ship or cargo are rendered liable to capture and condemnation, may justify abandonment of the voyage in order to avoid such capture, when reasonable grounds for apprehending actual capture are shown. Delivery at a port of destination which such actual state of war has made a hostile port so far as the vessel is concerned, would in such a case be excused. The German Code, in Arts. 629, 634, part of the law of the flag for the purposes of this case, has express provisions to this effect. Actual war, indeed, so coming into existence, makes it the ship's duty to her own sovereign not to enter a hostile port. Atkinson v. Ritchie, 10 East, 530, 533, 4; British, etc. Co. v. Sanday, etc. Co., App. Cas. 1916, 650. But no case is found in which, there being

no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made.

If, in the case of an actual state of war, arising after the voyage has begun, the ship or cargo might, under some circumstances, be put in immediate actual danger of capture from the moment in which the state of war became existent, so as to make it proper to say that reasonable ground for apprehending immediate war was, for practical purposes, equally reasonable ground for apprehending immediate actual arrest or restraint by capture, no situation of this kind, sufficient to bring the owner's abandonment of the voyage within the exception relied on, seems to me proved in the present case.

Unless something had happened to delay the ship, such as is not shown to have ever happened on any of her numerous prior voyages to the same ports, the specie to be delivered at Plymouth would probably have been delivered there by 1 a. m., on August 3, 1914, and that for delivery at Cherbourg, by 8 a. m., on the same day. It is to be noticed that the season of the year was that at which delay by weather conditions was least to be expected. The discharging facilities kept ready at both ports had enabled the ship, upon all but one of thirteen trips preceding this, as appears from her log, to leave Plymouth within an hour from her arrival; and the same is true as to Cherbourg. Her longest stop at Plymouth had been 78 minutes, at Cherbourg 66 minutes. Tenders controlled by her owner were regularly found awaiting her arrival, into which passengers, mails and specie were discharged alongside. She did not go to a dock at either port. Plymouth did not become a hostile port as regarded the steamship until August 4, at 11 p. m., when England declared war with Germany. Cherbourg did not become a hostile port until 6.45 p. m., on August 3, when Germany declared war with France. It is true that Germany had declared war with Russia at 7.10 p. m., on August 1, at which time the ship would still have been thirty hours distant from Plymouth, but it can hardly be claimed that a state of war with Russia only, exposed the ship to any immediate risk of capture. And after landing the Cherbourg specie as above, eleven hours before any war with France arose, another twenty-three hours' run at her usual speed between those ports would have brought her to Bremen, her home port, by 7 a. m., on August 4. The evidence shows no reason for apprehending detention at Cherbourg before 8 a. m., on August 3, nor until after 6.45 p. m., on that day. Nor is any reason shown for apprehending capture on the way from Plymouth to Cherbourg and thence to Bremen. English men-of-war only could have interfered with the ship, and she would have been at Bremen before any state of war with England existed. German vessels are shown to have used English ports and coast waters unmolested during the whole of August 4. Germany's refusal to give the requested assurance regarding Belgium, the determining cause of England's participation in the war, did not become a certainty before the last hours of that day.

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So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose. The carrier's abandonment of the voyage deprived the shippers of the specie of all chance of having it so delivered. Thereby the carrier took the risk that the actual course of events might fail, as it did, to show actual and immediate danger threatening the ship, either at the time or before she could have made delivery.

The carrier's act cannot be justified, as in The Styria, 188 U. S. 1, Nobel's Explosives Co. v. Jenkins, L. R. (1896), 2 Q. B. 326, "apart from the terms of the bill of lading,"—on the ground that the master's "duty to take reasonable care of the goods entrusted to him" required it. For that purpose discretionary action by the master would be necessary, which, as above held, is not shown. Nor does the evidence show that regard for the safety of the specie entered into the owner's determination to abandon the voyage. No reason appears for apprehending that capture or detention of the ship would, under the circumstances, have involved loss to the owners of the specie. The ship's value was considerably greater than the value of the specie, or the entire cargo on board. It was far more important to the owner of the ship than to the owners of the specie that she should avoid capture or detention by England, France or Russia. The evidence shows also that the order to turn this ship back to New York, instead of being a single order given with particular reference to this ship, or her cargo, or her relations thereto, was only one of many other like orders similarly transmitted during the same day to all steamships at sea belonging to the same owner, and then on voyages tending to bring them, if continued, within regions where, in case of actual war between Germany and the other countries named, their capture or detention might become possible. The owner's evident object was, not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger. This may well have been the course most for the owner's advantage. But, under the contracts here sued on, it cannot justly be held that the circumstances proved entitled her owner to divert this steamship from the voyage undertaken as above, without incurring any liability to the owners of the specie for their loss thereby caused. We know nothing more at present as to the amount of their loss than that it was substantial. Whatever they may prove their respective losses to have been, I consider the libellants in Nos. 1196 and 1199 entitled to recover against the steamship.

In regard to the cases Nos. 1197 and 1198, wherein the libellants were passengers, no reason is found for disturbing the result below. Not only did the contracts with these libellants permit to the ship a far greater liberty to change or abandon the voyage than was permitted by the bills of lading, but they expressly required written notice of any damage claim with full particulars, within ten days

after landing from the steamship; and it is admitted that no such notice was ever given. The libellant in 1197 accepted the return of his passage money; the libellant in 1198 accepted instead passage paid for by the claimant in another vessel.

BINGHAM, *J.*:

In Nos. 1196 and 1199, I am of the opinion that the decrees of the District Court should be reversed. The facts are substantially the same in the two cases, the only difference being that in the Guaranty Trust Company case the consignment of gold was to be delivered at Plymouth for transportation by rail to London, while in that of the National City Bank there were two consignments of gold, one to be delivered at Plymouth for transportation to London, and the other at Cherbourg for transportation to Paris.

In the opinion of the District Court the claimant was held to be excused from performing its contracts of carriage upon the ground that the telegram received by the master on the evening of July 31, 1914, from the managing directors of the claimant, saying, "War has broken out with England, France and Russia. Return to New York," stated facts constituting an exigency which authorized him to exercise the discretion vested in the master of a ship by the maritime law, and that, in turning back to America and abandoning the venture, he exercised his discretion and acted within this implied power; that the managing directors of the claimant, when they said in the telegram that war had broken out with England, France and Russia, in substance stated the truth regarding the political situation as it then existed in Europe; and that the claimant could avail itself of the master's exercise of discretion based on that information as a justification for its failure to perform the contracts.

Counsel for the claimant contend (1) that the foregoing ground upon which the decision of the District Court proceeded and upon which the decrees in these cases were based, is right; (2) that if the master did not act in pursuance of his implied authority, but abandoned the venture because the claimant, through its managing directors, ordered him to return to America, nevertheless, in view of the threatened danger of war, the claimant was justified in so ordering the ship back to America; and (3) that the claimant can justify its failure to perform its contracts under the exception contained in the bills of lading relating to "restraint of princes, rulers or people"; that, although war had not been declared and did not exist, the threatened danger of war was the equivalent of a declaration of war or of authorized acts of war, and operated directly as a restraint of princes.

It does not seem to me that any of these propositions are right as applied to the facts in these cases.

I. The ship took on board the consignments of gold on the 27th of July, 1914, and set sail at about one o'clock, on the morning of the following day. At that time England, France, Russia and Germany were at peace, although there was threatened danger of war. Whether on that day the claimant apprehended that the war clouds were probably clearing, or that in the event of hostilities the ship

would make her trip before war broke out is of little importance. Knowing that these countries were at peace, but that there was threatened danger of war, it made the contracts and took on board the shipments of gold for delivery at Plymouth and Cherbourg. And the evidence discloses that while the master may have had some anxiety after he set sail, and down to the evening of the 31st of July, as to the real condition of the political situation in Europe, he, nevertheless, proceeded at the rate of about twenty-two and one half knots an hour, making the usual time, without taking any precaution with reference to the outbreak of war until the night of the 31st of July, at about 10.09 o'clock, ship's time, when he received the telegram above set forth, and immediately turned his ship about for America. Having turned about, he then took such precautions as he thought necessary to avoid detection by painting his smoke stacks, dispensing with sidelights and darkening the port holes and cabin windows. It is evident from this that the immediate change in the course of the ship, resulting in the abandonment of the venture, was due to the receipt of the telegram on the night of July 31.

That the master, upon receiving the telegram, acted on the idea that he was relieved from exercising his discretion as to the course the ship should take, if he had coal enough to obey the order to return to America, is clearly shown in his answers to the following questions:

"Q. Assuming that you had enough fuel to make the voyage, you had to make the voyage that you were ordered to make, had you not? A. Yes, sir.

"Q. And that was to turn back to America? A. Yes, sir."

And to preclude the necessity of any exercise of discretion by the master, even as to the supply of coal, the managing directors, before they sent the telegram, had the location of the ship and the amount of coal on board computed, and knew that the ship had sufficient coal for the return trip.

The ship arrived in Bar Harbor on August 4, and, after the master had landed his passengers, discharged the gold, taken on board a supply of coal and discharged the balance of his cargo, which took until the 21st of August, he on that date made a written report to his company at Bremen, in which he stated in detail what occurred on the trip from the time the ship left New York until it reached Bar Harbor. In this report, among other things, he said:

"On July 28, at 3 a. m., we passed Ambrose Channel Lightship, steamed eastward on the prescribed course, up to July 31, 46° 46′ N., 30° 21′ W. Here we received the order to return, which was immediately carried out. While the ship was still in the act of turning, I directed that the passengers of the first and second cabin be requested to repair to the smoking-room, and when the ship was on the course to westward, I went down and acquainted them with the fact that war had broken out and that I had received orders from my company to return to New York."

This is not the language of one in authority stating action taken by him in the exercise of his discretion, but of a subordinate informing his superior that he has received his order, and carried it out. It

is a frank statement, free from equivocation, and in no way misleading. It was not formulated to meet a legal position, for these suits had not then been brought, and plainly states the truth—that he had received the order and obeyed it.

When the master had under consideration a matter of importance concerning the voyage as to which he had not received special directions, and requiring the exercise of his discretion, it was his custom to proceed in a deliberate and formal manner by calling his officers in ship's council. This he did on the evening preceding the receipt of the telegram, when he decided to continue on his voyage to Plymouth; and again, on August 3, when an exchange of signs between the cruiser Essex and the station at Halifax was overheard, and he decided to run for the port of Bar Harbor rather than to New York. In the report to his company he alludes to this, and says:

"As signs from the Essex were not very strong, and she might be watching the port of New York just as well as the port of Boston, I called my officers for ship's council, in which it was decided to run into the port of Bar Harbor."

And, again, in his testimony, in speaking of this matter, he said:

"I called my officers together, and said to the chief officer and to the second officer, who were there, 'Gentlemen, we are hearing these wireless signs getting nearer; they may be before New York Harbor; they may be before Boston Harbor; I think it is advisable that we should go out of the way and turn up north, and go to Bar Harbor, which is a path which is not trodden so much by steamers of our size and kind.'"

From these circumstances and others presented in the case, the reasonable inference is that his course of conduct on the evening of the 31st of July in turning back to America was not due to the exercise of discretion on his part, but was due directly to the order of his superior and in obedience thereto.

II. If, however, it could properly be found that the master acted upon the information contained in the telegram, exercised his discretion and determined to return to America, the claimant cannot avail itself of his decision as a defense to these actions. The information which the managing directors gave was false. War had not broken out, but it was purposely stated that it had to control the exercise of the master's discretion, if he wished to exercise it and did not at once follow their peremptory order. To permit the claimant to avail itself of the master's decision obtained under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud. That such was the purpose of the managing directors in sending the telegram is plainly deducible from the evidence presented by the record. From this it appears that, at the time the message was sent and at the time it was received, war had not been declared and had not broken out between England, France, Russia and Germany or between any two of those nations; that at 2.45 o'clock in the afternoon of July 31, when the telegram was sent, the managing directors had simply received information that the German Emperor was to issue a procla-

ation declaring a state of war, which would have the effect of tting Germany on a war footing, but would "not amount to a claration of war against or actual hostilities with any other na-n." Their information amounted to nothing more than that a cree of a state of martial law for Germany was about to be issued. further appears that the managing directors, in the stipulation ed by the claimant in these cases as evidence, stated that is decree was "the immediate reason for the recall of the cilie"; that all other political advices and facts which they d, without knowledge that the government was to declare a state war, would not have caused them to take immediate action in gard to their vessels; that "this decree of a state of war alone can designated as a decisive fact inducing us to recall the Cecilie"; and at the reason why they stated in their telegram to the master that r had broken out, instead of stating the facts as they existed, was at they deemed "every other information in regard to the political uation, every statement that was not absoluely clear and compre-nsive in regard thereto, as inadvisable, and could only lead to mis-derstanding and unsafe resolutions," and that the wording of their legram "occurred purposely in the form that we reported the war e already having broken out, and has nothing to do with the word-g of our telegram code."

The conclusion is irresistible that the telegram was primarily an der, and the information it gave as to the political situation was rposely false and so framed that the master would be compelled to ey the order whether he wished to exercise his discretion or not. It is useless to discuss the question whether, if the managing di-tors had stated in the message the true condition as to the political uation, an exigency would have been presented which would have thorized the master to exercise his discretion, for the true situation as not presented to him, and, if it had been and he had been per-itted to exercise his discretion, it is entirely problematical what ourse of action he would have pursued.

III. As the abandonment of the venture by the ship's return to merica was due to the peremptory order contained in the telegram, e will consider the question whether the claimant, apart from the exceptions contained in the contracts, can justify its conduct in dering the ship to return to America because of the threatened nger of war.

In Atkinson v. Ritchie, 10 East. 530, this question was consid-ered. In that case the action was assumpsit for breach of an agree-ment in not loading a complete cargo of hemp. Ritchie, the master and owner of the ship Adelphi, chartered her to Atkinson, a London merchant, agreeing to proceed to St. Petersburg and there load from the factors of Atkinson a complete cargo of clean hemp and eighty tons of iron for ballast, not exceed-ing what she could reasonably stow, and, being so loaded, to proceed to Woolwich and London and deliver the same on being paid the freight, "restraint of princes and rulers during said voyage always excepted." The ship arrived at Cronstadt, the port of St. Peters-burg, on the 16th of September, 1807, where Ritchie proceeded to

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take on cargo under the charter-party, and continued loading with all due diligence until the 25th of that month. He had then taken on board between seventy and eighty tons of iron, a sufficient quantity for ballast. "On the 25th of September there was a general rumor of an embargo being intended to be laid by the Russian government on all British vessels; and there was every appearance that it would take place immediately; but it did not in fact take place then, nor until six weeks afterwards." But on the 25th, the British consul, expecting that the embargo might take place immediately, caused a letter of advice to this effect to be written to Ritchie, in consequence of which he gave instructions to leave off screwing down any more hemp—which was the usual mode of loading—and to fill the ship as fast as possible by hand, and the work continued by hand until six o'clock that night, when she was filled, as far as could be done, in that manner. On the evening of the 25th the ship sailed with a cargo of about half what she could have carried, although there was at the time hemp ready to be loaded which would have completed loading her. "Ritchie acted bona fide and as an honest man under the existing circumstances, and there was a reasonable and well-grounded apprehension for his acting as he did; and he brought home as complete a cargo as he could under the circumstances." The Adelphi arrived in London, delivered her cargo there to Atkinson, who refused to pay the freight, as a little more than a moiety of the quantity of hemp stipulated for by the charter-party was brought. On behalf of the master of the ship it was contended that "an exigency had arisen, and it was a paramount duty of the master, imposed upon him by law, to act for the benefit and safety of the ship, the crew and the cargo, and, still more, for the State to which he belonged, and that the reasonable apprehension of danger created the exigency. And that the master was in duty bound to do the best he could for all concerned, to preserve his ship for the State, as well as for the individuals concerned, to prevent them from falling into the hands of the enemy; and this was evidently a hostile embargo." In delivering the opinion of the court, Lord Ellenborough answered this contention, as follows:—

"The parties are the merchant freighter on the one hand, and the master on the other; each contracting for himself with the other, as principals. Under such circumstances, any constructive agency on the part of the defendant, in his character of master, for the plaintiff, as the freighter of the goods, is wholly out of the question. Their relative claims upon, and duties in respect of, each other are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself can be engrafted upon it by implication, as an excuse for its non-performance."

This case clearly shows that the claimant, being one of the principals to the contract of carriage, had no discretionary authority vested in it by which it could justify an abandonment of its contract obligations, in case of the threatened danger of war, even though it honestly believed that the threatened danger presented an exigency, and

that it must justify its conduct in abandoning its contracts, if at all, under the exceptions contained therein.

IV. The question remains whether the contracts of shipment as expressed in the bills of lading contain exceptions which would excuse the claimant from the performance of the contracts. The exceptions in the bills of lading upon which counsel for the claimant rely—the two contracts being alike so far as this matter is concerned—are those relating to the "restraint of princes, rulers or people."

Lord Wrenbury, delivering an opinion in the House of Lords, in the case of the British & Foreign Marine Insurance Co., Ltd., v. Samuel Sanday & Co., L. R. (1916) A. C. 650, 671, in discussing the meaning of the words, "restraint of kings, princes and people," in a policy of insurance, and what would constitute such a restraint, said:—

"A declaration of war by the Sovereign is a political or executive act, done by virtue of his prerogative, which creates a state of war. A state of war is a lawful state, and is one in which every subject of His Majesty becomes an enemy of the nation against which war is declared. The declaration of war amounts to an order to every subject of the Crown to conduct himself in such way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. * * * 'A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal.'"

In that case it was held that the declaration of war between England and Germany on the 4th of August, 1914, rendered trading by an English ship at a German port illegal, and would render the master of the ship with a cargo destined for such port subject to arrest and his ship and cargo subject to confiscation; that the declaration of war by the sovereign, being a political or executive act, operated directly upon the master, ship and cargo and constituted a restraint of kings, princes and people within the meaning of the policy of insurance, although they were not subjected to actual or physical restraint.

The cases we are considering differ widely from the one passed upon by the House of Lords, for here, at the time the ship turned back for America and abandoned the voyage contracted for, the sovereign powers of Germany, England and France had not declared war, the voyage was not illegal and there was no sovereign act in existence which operated or could operate as a restraint within the meaning of the clause, "restraint of princes, rulers or people," either directly or indirectly. No case has come under my observation where it has been held that there was a restraint of princes within the meaning of the clause in the absence of an act of a sovereign power or state rendering the venture unlawful; or, if the sovereign act was that of a foreign power or state, so that the venture was lawful, unless the circumstances disclosed physical restraint due to that sovereign act of a direct and operative nature. Where

the venture is rendered illegal by a declaration of war, the legal restraint operates directly and immediately upon the master, ship and cargo, and makes his dealing or attempting to deal with the enemy unlawful. British & Foreign Marine Insurance Company, Ltd., v. Sanday & Company, supra. Whereas, if the venture is lawful (the ship and cargo being that of a neutral power), and the port of destination is blockaded, or the cargo is contraband and destined for a belligerent port, it must appear that restraint of a physical nature was operative to come within the meaning of the clause. Nobles Explosives Co. v. Jenkins, L. R. (1896) 2 Q. B. 326; Rodoconachi et al. v. Elliott, L. R. 9 Common Pleas Cas. 518; The Styria, 186 U. S. 1; Balfour, Gutherie & Co. v. Portland & Asiatic S. S. Co., 167 Fed. 1010. And that if it appears the abandonment of the venture was to avoid encountering a future peril to which the ship or cargo might become subjected, the necessary restraint, within the meaning of the clause, would be wanting. Atkinson v. Ritchie, supra; Mitsui & Co. v. Watts, Watts & Co., Law Times Reports, Vol. 15, issued April 15, 1916; Hadkinson v. Robinson, 3 Bos. & P. 388; Kacianoff v. China Traders Insurance Co. (1913), 3 K. B. 407.

Here there was no declaration of war or authorized acts of war involving the nations in question at the time the ship abandoned her contract. The venture was legal, not illegal, and her return to America was not due to any restraint of a sovereign act, legal or physical; but was to avoid a supposed future peril to which it might become subjected.

In Nos. 1197 and 1198, the actions brought by Charles Rantoul, Jr., and Maurice Hanssens, passengers on the steamship Cecilie, to recover for failure to transport them from New York to Cherbourg and Plymouth, respectively, I agree with the conclusions reached in the opinion of the District Court, but not for the reasons there given. The tickets issued to these passengers contained the following provision: "No claims under this ticket shall be enforcible against the shipowner or its property or the agent or passage broker, unless notice thereof in writing, with full particulars of the claim, be delivered to the shipowner or agent within five days after the passenger shall be landed from the transatlantic ocean steamer at the termination of her voyage, or, in case of the voyage being abandoned or broken up, within ten days thereafter." And the claimant in its answer sets forth this provision of the contracts and alleges that no such notices were given within either of the periods so specified. As the voyage was abandoned or broken up by the ship's return to America, it became incumbent upon the libellants, in order to recover damages for breach of their contracts, to prove that notices of their claims were given within the time specified in the stipulation above referred to. This they not only failed to do, but admitted that no notices were given.

The libellants seek to avoid the effect of this stipulation on the ground that the ship, by deviating or abandoning its voyage, displaced the contracts and thereafter made the carrier an insurer against all loss and deprived it of the benefit of the conditions contained in the contracts; and, in support of their contention, they refer

to certain cases in which the carrier was held liable for loss or damage to goods occurring during or after a deviation had taken place. Morrison v. Shaw, S. & A. Co., Ltd., 1916, 1 K. B. 747; Brunner v. Webster, 5 Commercial Cases, 167. These cases do not seem to me to be in point. There the plaintiff was not suing on the contract of carriage, but upon the common law obligation of the defendants for loss of or damage to goods occurring after the voyage had been abandoned; while here each libellant is suing upon the contract and must take it with all the stipulations which it contains.

A majority of the court concurring, it is ordered, adjudged and decreed as follows:—

In Nos. 1196 and 1199 the decrees of the District Court are reversed, and the cases are remanded to that court, with directions to enter in each an interlocutory decree for the libellants, and for further proceedings thereon in accordance with law; and the appellants recover their costs of appeal.

In Nos. 1197 and 1198 the decrees of the District Court are affirmed, and the appellee recovers its costs of appeal.

United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1196.

STEAMSHIP KRONPRINZESSIN CECILIE.

GUARANTY TRUST COMPANY OF NEW YORK, Libellant, Appellant,

v.

NORTH GERMAN LLOYD, Claimant, Appellee.

No. 1197.

CHARLES W. RANTOUL, JR.,

v.

SAME.

No. 1198.

MAURICE HANSSENS

v.

SAME.

No. 1199.

NATIONAL CITY BANK OF NEW YORK

v.

SAME.

Appeals from the District Court of the United States for the District of Massachusetts.

Before Putnam, Dodge, and Bingham, JJ.

Opinion by Judge Putnam.

November 17, 1916.

PUTNAM, *J.* (dissenting):

These proceedings originated in several libels in the District Court. In each of which the decree of the District Court was in favor of the steamship Kronprinzessin Cecelie. Several appeals have been taken, which appear in this court as Nos. 1196, 1197, 1198 and 1199, but they all involve the same main question, and can be conveniently

disposed of by a single opinion. The facts herein stated cover all the cases except as we may otherwise explain.

The learned judge of the District Court said:—

"In the first case, the Guaranty Trust Company of New York seeks to recover damages for breach of contract, by the steamship, in failing to carry a consignment of gold from the port of New York to the port of Plymouth, England. The libel alleges that on July 27, 1914, the steamship was lying in the port of New York, bound for Bremerhaven, Germany, by way of Plymouth, England; that on that date the libellant delivered to the steamship in good order and condition ninety-three kegs of gold bullion, of the agreed and declared value of $4,942,936.64, to be carried to Plymouth, England; thence to be forwarded to London; to be there delivered in like good order and condition to the order of the libellant, in consideration of $9,268 prepaid freight; that the steamship delivered to the libellant a bill of lading therefor; that, in violation of her contract, the steamship, when about 900 miles from Plymouth, abandoned her voyage and put back to Bar Harbor, Maine; where, on or about August 8, 1914, the libellant accepted redelivery of the ninety-three kegs of gold from the steamship, under an agreement that such redelivery should not constitute a waiver of libellant's claim for breach of contract; by reason of such failure of the steamship to deliver the gold at Plymouth, the libellant says, it has suffered damage exceeding the sum of $1,104,467.43; the libel was subsequently amended, increasing the amount claimed as damages to $1,793,278.22; and the libellant says that no part of this sum has been paid.

"The answer admits the receipt of the ninety-three kegs of gold bullion, and alleges that the carriage of the same was undertaken by the claimant, subject to the conditions and exceptions contained in the bill of lading, which is made a part of the answer; subject also to the possibility of the ship being prevented from concluding her voyage and being forced to put back into a port of refuge, in case of outbreak, or threatened outbreak, of the European war. It admits that the steamship turned back on her course, and says that at the time of turning back she was about 1,070 miles from Plymouth; it alleges that the decision of the master to return to a port in the United States was based upon credible information received by him from the North German Lloyd office at Bremen, by wireless message, that war had broken out, involving Germany and Russia, France and England, and that this message, considered in conjunction with the information with respect to the European crisis received by him prior to sailing, furnished reasonable ground for him to apprehend that the steamship and cargo would be captured if she continued on her voyage, and required him, in the exercise of sound judgment and discretion, to put back to a port of refuge; that, though war had not actually broken out at the time of the receipt of this wireless message, still the master, in anticipation of an outbreak of hostilities, and the consequent danger of arrest of the members of his crew, the arrest or probable detention and discomfort of his passengers, and the capture of his ship and cargo, was fully justified in adopting the course which he did adopt.

"The answer further alleges that the course followed by the captain was successful; that his return to a port of refuge, and the delivery of the specie to the parties entitled to it, were accomplished without the capture or detention of a single passenger or member of the crew, and without loss or damage to any of the specie, or to any other part of the cargo.

"As a third defense, the answer asserts the exception in the bill of lading against liability for the loss or damage 'occasioned by arrest and restraint of princes, rulers or people.'

"Certain facts are stipulated; the libellant is a corporation organized under the laws of the State of New York, having its office in New York and a branch office in London. The claimant, North German Lloyd, is a corporation organized under the laws of Bremen, existing under said laws and the laws of the German Empire; and is the owner of the Kronprinzessin Cecilie; the steamship was built in 1907, at a cost of about $4,500,000; on July 27, 1914, the libellant shipped on board the steamer ninety-three kegs containing gold bars, owned by the shipper, of the value, at the time and place, as set forth in the libel; by the terms of the contract, the gold was to be carried by the steamer from New York to Plymouth, England; thence to be forwarded, at the steamer's expense, but at the owner's risk, to London, unto the Guaranty Trust Company, of New York, or its assigns, subject to the provisions and exceptions of the bill of lading; the steamer was fully manned, outfitted and equipped, and sailed on the voyage from New York on July 28, 1914, about one o'clock in the morning; she continued on the voyage until the night of July 31, at about nine minutes past ten o'clock in the evening, ship's time, when she turned back towards New York; at the time of turning back the steamer was a distance of about 1,070 nautical miles from Plymouth; just before turning back, about ten o'clock in the evening, a wireless message was received on board of the steamer from the directors of the North German Lloyd at Bremerhaven, in private code. The translation of the message reads as follows: 'War has broken out with England, France, and Russia. Return to New York.' It was signed by the managing directors of the claimant company; after having been informed of the intention of the Government to despatch on that day the notes to Russia and France which are referred to in the German White Paper, and after a general warning by the Admiralty to the German Merchant Marine, and after the directors had received information that a declaration of a state of war had been perfected and would shortly be proclaimed.

"Certain historical facts are agreed upon, as part of the proofs. Those stipulated as having happened before the ship sailed from New York are as follows: On June 23, 1914, Archduke Francis Ferdinand, of Austria, and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia; on July 23, Austria sent an ultimatum to Servia; on July 24, Russia urged that Austria abandon the time limit of her ultimatum 'in order to prevent consequences equally incalculable and fatal to all the powers which might result from the course of action followed by the Austro-Hungarian Government'; the Russian Government informed the

other powers that, if the Austro-Hungarian Government should make war on Servia, Russia could not allow the conflict to be settled between those two countries alone; the French Ambassador at St. Petersburg gave the English Ambassador at St. Petersburg to understand 'that France would fulfill all the obligations entailed by her alliance with Russia, if necessity arose, besides supporting Russia strongly in all diplomatic negotiations'; on July 25, Austria declined the Russian request for extension of time limit in ultimatum to Servia; Austria advised Servia and the other powers that she considered Servia's reply unsatisfactory; the Austrian Minister left Belgrade at 6.30 p. m.; the Servian Government moved from Belgrade to Nish the same evening; Germany confined her Alsace-Lorraine garrisons to barracks, and placed the frontier works of Alsace-Lorraine in a complete state of defense; Servia ordered mobilization; Russia began to take military precautions; martial law was proclaimed in Austria.

"On July 26, Austria severed diplomatic relations with Servia, and sent passports to the Servian Minister; Austrian mobilization against Servia was decreed; Austria advised Russia that she sought no territory of Servia, and did not intend to impair the sovereignty of that country, but that, aside from that, she was prepared to go to the furthest extremes to obtain satisfaction of her demands; the Servian army began mobilization.

"The history shows that all powers thereupon became promptly involved, including Austria, Russia, Germany, France and England. Thereupon, on July 30, the German Ambassador at St. Petersburg was directed to make the following declaration to the Russian Government: 'Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France. We cannot assume that Russia desires to unchain such a European war. Since Austria-Hungary will not touch the existence of the Servian Kingdom, we are of the opinion that Russia can afford to assume an attitude of waiting. We can all the more support the desire of Russia to protect the integrity of Servia, as Austro-Hungary does not intend to question the latter. It will be easy in the further development of the affair to find a basis for an understanding.'"

We will add that it is true that the Russian Secretary at this time, that is, on July 30, declared that there had been no mobilization, but events came on so rapidly that while it must be admitted that no flagrant war had broken out involving France, Russia and England with Germany at the time the wireless message came to the captain of the Cecilie from the North German Lloyd office, yet the mobilization on the part of Russia was in hand, and that mobilization meant flagrant war within the meaning of the message of the North German Lloyd office by wireless, so that for all practical purposes, with reference to this steamer, she was on mid-ocean, and at least a full day's sail from Plymouth, and in the full hazard of that position in mid-ocean, bound for the port of a threatened enemy.

To test this, let us look at the actual position in which the shippers placed her. The war which ensued finally came quickly on, involving all the great powers of Europe: England, France, Germany, Austria and Russia. The ship in this case was a German ship. She was chartered at New York for a voyage to Bremerhaven, touching first at Plymouth, where she was to deliver the most valuable part of her cargo at what might be a hostile port; and then again at Cherbourg she would deliver more of her gold, which might be another hostile port, and then proceed to her own home port at Bremerhaven. She represented a value of more than eleven million dollars, largely of what might be hostile gold, shipped for London and Paris, with a valuable general cargo of $139,335.

The Cecilie had aboard 1,892 persons of mixed nationalities: 354 Americans, 667 Germans, 406 Austrians, 151 Russians, and other nationalities of minor amounts, involving nearly all the nationalities of Europe, including some nationalities that would have been hostile, if war had broken out, to any port she might touch, including her port of final destination.

In the event of flagrant hostilities, the master of the ship would have represented the entire enterprise, and would have been quite certain to fall into hostile hands wherever he might have been, unless in an American port; so that in case of hostilities the vessel would have been safe only in America, and by his turning back he accomplished the safety of all concerned. It is true that when he sailed from New York the master was aware of the possibility of the ship being prevented from completing her voyage, and being forced to put back into a port of refuge. He protected himself by using in his bill of lading the usual exemptions from the hostile acts and purposes of princes and nationalities. So far as this ship is concerned and these bills of lading were concerned, they were not hampered by any peculiar provision of any laws applicable to the ship, but the ship and cargo and passengers were protected to the full extent of the rules of the general international laws that are known to all the nations of the world.

When the ship sailed, and gave her bills of lading, the possibility of war was known, but the amount of freight charged was on the basis of only $9,268 for the gold belonging to the Guaranty Trust Company, and on a like basis for the rest of the gold, and it contemplated imposing no particular hazard on the ship, and the ship undoubtedly loaded her cargo on the twenty-seventh day of July apprehending that the war clouds were probably clearing. The record shows that as late as July 30 those trading with a hope of peace were justified in doing so, and the rates of freight charged for this ship were based on that hope. Instead of that, however, the clouds gathered with remarkable rapidity; so much so that within four days after sailing it became evident that they were about to break, and that for the protection of the entire enterprise, the ship must return to a neutral port.

Captain Polack testified that meanwhile, by communicating with vessels by wireless and otherwise, he had received information during the intervening period in regard to the progress of events, and

was waiting for further information by wireless, and that, when he turned back, he acted, not only in accordance with his instructions, but also on the idea of his own best judgment, in running no further danger.

It is unnecessary to cite authorities on this topic, because the law is too well settled and the underlying principles are all too uniformly accepted, in the circumstances of this case, to the effect that it was not only the right but the duty for the master of this ship not to delay, and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture, and to have due regard to the uncertainties of the ocean, and leave reasonable margin for the state of weather and for accidental detentions; and under the circumstances of this case the decision to turn back was justifiable whether it came from the master or owners.

It is also plain that the positions of the libellants in these cases would reverse all these propositions had they been accepted, and would have involved this ship and the entire enterprise in hazards which the master had no right to assume. On the broad ocean, with no pilot but his own foresight and ingenuity, it is the duty of a master under such circumstances, not only to use diligence in escaping act-al danger, but to use it in avoiding what is threatened; and, considering the number of people and the value of the ship, and the property which she had aboard, and the complexities of the hostilities by which she was endangered, the exigencies cannot be too strongly described.

This ship lost nothing, and the holders of her bills of lading lost nothing; but in regard to this particular shipment by the Guaranty Trust Company, if this libel is sustained, the company would receive exchange to the amount of $1,793,278.23. This would be all profit, and an addition to the amount of gold shipped which represents no amount paid out by the shippers. The same would apply to the other libellants in proportion to the amounts involved. It would prove a profit for the Guaranty Trust Company and to other shippers proportionately, and a corresponding loss to the ship, without any sum being paid therefor. Looking at the case from this point of view, it is incredible to suppose that, for the mere amount with reference to the Guaranty Trust Company, namely, the $9,268, damages or compensation in this large sum were ever contemplated. It is incredible to suppose that a profit and loss of such an amount was ever contemplated or agreed upon, and it cannot be recovered, of course, unless there were expressed or implied stipulations, agreed to by the parties, that it should be paid.

The British and Foreign Insurance Co. v. The Sanday & Co., Appeal Cases, 1916, 650, decided January 27, 1916, in our judgment disposes of any question which can be considered as left open in this case, and that is as to the effect of the usual exceptions contained in bills of lading. This case relates to this very war, and concerns what constitutes a deviation within the meaning of that exception. This case concerned two British vessels laden with merchandise for sale in Germany. While on the voyage from the Argen-

tine to Hamburg, at the time of the declaration of war between Great Britain and Germany, the vessels shifted their courses. It was held that the voyages became illegal by force of the declaration of war, and the voyage could not lawfully be completed, and there was no deviation in law. The court was a very full court and there was no dissent, and there can be no doubt that the position was in accordance with the law universally held. It is enough to quote Lord Loreburn, page 660, as follows:—

"It was therefore a loss within the clause which insures these goods at and from losses against restraints by kings, princes or peoples."

This case covers the only point which had not been precisely covered in the previous decisions, although they led directly up to it, namely: that obedience to an obligation which was a direct result of a condition of law arising out of the existence of war operates as a restraint precisely within these provisions, without any physical act on the part of the legal authorities. The case at bar would have been precisely within this decision if war between Great Britain and Germany had broken out before the Cecilie reached Plymouth, so that it would have been a violation of the law of Germany for her to enter that port. With that single exception the cases are precisely alike, and it certainly cannot be said that the deviation of the Cecilie accomplished for the purpose of preventing a pending breach of German law was not as efficient as it would have been if a deviation had occurred two or three days later. Taking the cases by and large, there cannot be said to be substantially any distinction between them.

We think the following impressions are enough to dispose of all the cases. Of course, the telegrams which passed between the sovereign heads of Germany, Russia and England are matters of common knowledge with reference to an investigation of this character; and they illustrate very clearly the fact that the question of peace and war was hanging by a single thread, and it was settled over night, or in less time than over night. When this ship was loaded at New York it was known that the world was on the verge of war or on the verge of peace. The voyage involved three different ports, one of which was friendly and two of which were liable to be hostile; and it also involved the four seas, with the certainty of capture in the case of hostilities. When the ship sailed it was, of course, not known whether war would break out, or when it would break out; but, as she progressed on her voyage of five or six days from New York, towards Plymouth, the master of the ship was in frequent communication, and getting frequent impressions, as to the probability of war or peace in various ways. As he went on his voyage the clouds thickened, and whatever hopes there might have been of peace were disappearing; and, when he was within two or three days of Plymouth, he was within the almost immediate presence of war or peace, with the practical certainty of war. His voyage, moreover, was liable to be delayed by maritime misfortunes. The dangers of navigation, and the possibility of being delayed by those

dangers around the British Isles being so considerable, that it was impossible to say, except in absolutely clear weather, as to the time of arrival within one, two or three days, or within the period which intervened between the time when he turned the ship about and the time of the actual outbreak of hostilities. All the time he was on dangerous ground, with the danger at all times increasing as he proceeded on his voyage; so that although he sailed with a reasonable probability of peace instead of war, the probability of war, with enemies all about him, advanced almost to a certainty before he reached the point where he changed his course. In addition to this, the whole transaction must be looked upon together, and the orders which he received not to visit any hostile port, on the first of August, the day after he turned his ship, were sufficiently connected with what preceded to justify his continuing his purpose to return to a neutral port, which was still incomplete. This decision should not turn on a narrow rule, as it was still in abeyance. Therefore, from any point of view, the master was justified, on receiving the telegram, on the first day of August, in continuing on his return voyage to a neutral port.

Here was a ship whose cargo was, perhaps, neutral, but the ship was herself advancing into the danger zone with nearly 2,000 persons aboard, many of whom might have been liable, on arrival at the first port of discharge, to an indefinite detention if the ship had been accidentally arrested. By the laws of the sea the whole is to be looked upon, ship, cargo and passengers, as a single venture, and all resting upon the shoulders of one man—the captain. Assuming that, when he left New York, he had the prospect of a clear voyage, under the original probability that, as he advanced upon it he might find the clouds cleared away, the events worked otherwise. He was, he testified, in constant anxiety as he advanced on account of the information which he received, and he would have been justified, on finding the increased danger, to have returned to a neutral port independently of any advices from the ship's owners.

There was no Moorish cruiser lying across his path, as there was in Driscol v. Bovil, 4 B. & P. [1798], with the danger of slavery following capture, which caused the crew to refuse to sail; but there was danger of a possible, and even probable, detention of all the German passengers aboard; and the captain had as good reason for avoiding danger as there was in the case referred to, in which it was held that there was no deviation which would affect the insurance policy.

The appeal of the National City Bank affords nothing substantially different from the appeal of the Guaranty Trust Company, but it illustrates it forcibly. In the City Bank case the amount involved was gold shipments; one of them amounting to $2,104,254.34 to be unladen at Cherbourg for land transportation from there to Paris. This, of course, was for French delivery at a French port. If the regular course of her voyage proved without incident, the libellant estimated that the ship would have reached Plymouth before midnight on the second day of August, and Cherbourg early in the morning of the third day of August. It is maintained by the libel-

lant that the precise time of arrival was not critical, for it says it is clear, in any event, the Cherbourg shipment would have been landed in France at least seven hours before Germany declared war, and before Franch declared war upon Germany, and that, if the libellant's theory had been true, the shipment would have been landed, at least, twelve hours before then, and that there is, therefore, ample reason that, in either event, the Cherbourg shipment would have been landed, and the ship would have turned back, either to America, or have gone on to Bremen, not less than six, and probably, at least, twelve hours before the state of peace was changed into a state of belligerency. Upon this the libellant claims that the court could assume that there would have been no act of hostility, but the question was not what the court would assume, but what hazard the master of the vessel might run. The whole of this hypothesis demonstrates to what extent the libellants were willing to drive the ship into a corner, and what computations they were making, which they were willing to impose upon her, as against the path of actual safety which she adopted.

United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1196.

STEAMSHIP KRONPRINZESSIN CECILIE,

GUARANTY TRUST COMPANY OF NEW YORK, Libellant, Appellant,

v.

NORTH GERMAN LLOYD, Claimant, Appellee.

No. 1199.

NATIONAL CITY BANK OF NEW YORK, Libellant, Appellant,

v.

NORTH GERMAN LLOYD, Claimant, Appellee.

On May 23, 24 and 25, A. D. 1916, these causes came on to be heard together, and were fully heard by the court, Honorable William L. Putnam, Honorable Frederic Dodge and Honorable George H. Bingham, Circuit Judges, sitting.

Thereafter, to wit, on November 17, 1916, opinions by Dodge, J. (page 435), and by Bingham, J. (page 447), and by Putnam, J. (page 447), were filed, and the following Final Decree was entered in each case:—

Final Decree.

November 17, 1916.

This cause came on to be heard May 23, 24 and 25, 1916, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, November 17, 1916, here ordered, adjudged and decreed as follows: The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter an interlocutory decree for the libellant, and for further proceedings thereon in accordance with law; and the appellant recovers its costs of appeal.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on January 16, 1917, the following Motion for Stay of Mandate was filed by the appellee in each case:—

Motion for Stay of Mandate.

[Filed January 16, 1917.]

Now come the appellees in the above-entitled action and move for a stay of mandate therein until further order of this court and pending the determination of a petition for a writ of certiorari by the Supreme Court of the United States, which petition counsel for the appellees are now preparing and intend to file immediately.

CHOATE, LAROCQUE & MITCHELL,
CHAS. F. CHOATE, JR.,
Proctors for the Appellees.

On the same day, to wit, January 16, 1917, the following Order of Court was entered in each case:—

Order of Court.

January 16, 1917.

Upon motion by appellees, It is ordered that mandate herein be, and the same is, stayed till further order of court.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages num-

bered 1 to 472, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including January 19, 1917, in the causes in said court numbered and entitled,

No. 1196.

STEAMSHIP KRONPRINZESSIN CECILIE.

GUARANTY TRUST COMPANY OF NEW YORK, Libellant, Appellant,

v.

NORTH GERMAN LLOYD, Claimant, Appellee.

No. 1199.

NATIONAL CITY BANK OF NEW YORK, Libellant, Appellant,

v.

NORTH GERMAN LLOYD, Claimant, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this nineteenth day of January, A. D. 1917.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk*.

UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you suits in which Guaranty Trust Company is appellant, and North German Lloyd, Claimant of the Steamship "Kronprinzessin Cecilie", is appellee, No. 1196; and National City Bank of New York is appellant, and North German Lloyd, Claimant of the Steamship "Kronprinzessin Cecilie", is appellee, No 1199, which suits were removed into the said Circuit Court of Appeals by virtue of appeals from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said causes and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said causes, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of March, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the same cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of record in the above suits now on file in the Office of the Clerk of the Supreme Court of the United States, be taken as a return to the writ of certiorari herein dated March 24, 1917."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twenty eighth day of March, A. D. 1917.

[Seal United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON, *Clerk.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1196.

GUARANTY TRUST COMPANY OF NEW YORK, Libellant,

v.

S.S. "KRONPRINZESSIN CECILIE", NORTH GERMAN LLOYD, Claimant.

No. 1199.

NATIONAL CITY BANK OF NEW YORK, Libellant,

v.

S.S. "KRONPRINZESSIN CECILIE", NORTH GERMAN LLOYD, Claimant.

Stipulation as to Return.

(Filed in Circuit Court of Appeals March 28, 1917.)

It is hereby consented that the certified transcript of record in the above suits now on file in the Office of the Clerk of the Supreme

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Court of the United States, be taken as a return to the writ of certiorari herein dated March 24, 1917.

KIRLIN, WOOLSEY & HICKOX,
Proctors for the Guaranty Trust Company of New York.
SHEARMAN & STERLING,
Proctors for National City Bank of New York.
CHOATE, LAROCQUE & MITCHELL,
Proctors for North German Lloyd.

[Seal United States Circuit Court of Appeals, First Circuit.]

Dated, March 26, 1917.
A true copy:
Attest:
ARTHUR I. CHARRON, *Clerk.*

[Endorsed:] File No. 25,752. Supreme Court of the United States. No. 922, October Term, 1916. North German Lloyd Claimant, etc., vs. Guaranty Trust Company et al. Writ of Certiorari.

Copy of the within writ received this 26 day of March, 1917.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Guaranty Trust Co. of N. Y.
SHEARMAN & STERLING,
Proctors for National City Bank of N. Y.

[Endorsed:] File No. 25,752. Supreme Court, U. S. October Term, 1916. Term No. 922. North German Lloyd, Claimant, etc., vs. Guaranty Trust Company et al. Writ of certiorari and return. Filed March 30, 1917.

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SUPREME COURT OF THE
UNITED STATES.

No. 922.

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, claimant of the Steamship "KRONPRINZESSIN CECILIE,"
Petitioner,

AGAINST

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE PROCEEDINGS.

This cause is in this Court on a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit, issued on the petition of North German Lloyd, claimant of the steamship *Kronprinzessin Cecilie.*

The suit was by a shipper against a common carrier for the latter's failure to deliver in accordance with its legal obligation.

The Guaranty Trust Company of New York on July 28, 1914, shipped a quantity of gold upon the steamship *Kronprinzessin Cecilie,* as a common carrier, to be transported to Plymouth, England, and thence to be delivered by the carrier to the libelant at London.

The references are to folios in the record.

The steamship sailed from New York on July 28, but did not complete the voyage to Plymouth, and on July 31, when distant two days' sailing from that port, abandoned her voyage under orders from her owners and proceeded back to the United States.

She anchored at Bar Harbor early in the morning of August 4, and a few days later returned the gold to the libelant without prejudice to the latter's claims. Fol. 79.

This libel was subsequently filed against the vessel to recover the very heavy damages caused to the shipper by the failure of the steamer to perform her obligation.

It is conceded by the claimant that by reason of its non-delivery of the gold in Europe, the libelant has sustained substantial damage, in case the Court finds any liability on the part of the ship. Fols. 1280-1282.

Abstract of the Pleadings.

The Libel.

The libel was filed on October 21, 1914, and alleged that the Guaranty Trust Company was a New York corporation and that the steamship *Kronprinzessin Cecilie* was a German steamship that had been operating as a common carrier between New York and Bremerhaven, Germany, via English and French ports. Fols. 2, 3.

It was alleged that on July 27, 1914, the libelant delivered to the steamship *Kronprinzessin Cecilie* at New York and bound for Bremerhaven via Plymouth, 93 kegs of gold of the declared value of $4,942,936.64, to be carried by the steamer as a common carrier to Plymouth,

thence to be forwarded to London in consideration of freight of $9,268, prepaid by the libelant at the time of shipment; a bill of lading was then issued by the ship-owner to the libelant binding the steamer to transport and deliver the gold. Fols. 3, 4, 5.

It was then alleged that the steamer proceeded on her voyage towards Plymouth, where she would have arrived and delivered the gold on August 2nd, but instead of doing that the steamer improperly and in breach of her contract turned back on her course when about 900 miles from Plymouth, abandoned her voyage and proceeded to Bar Harbor, Maine, and thence to Boston. Fols. 6, 7.

It was alleged that the abandonment by the steamer of her voyage was due to the anticipated outbreak of war in Europe, but a state of war did not exist between Great Britain and Germany previously to 11 p. m. on August 4, 1914, and before that time the steamer, in ordinary course, would have reached the port of Plymouth and delivered the libelant's gold in accordance with the contract. Fols. 8, 9.

The libel then alleged that in consequence of the wrongful abandonment of the voyage, the libelant took redelivery of the gold about August 8, 1914, under an agreement with the ship-owner that the redelivery was without prejudice to the libelant's claim. Fols. 10, 11. In consequence of the failure of the steamer to deliver the gold at Plymouth as agreed, the libelant suffered damages exceeding $1,040,467.43.

By motion granted on February 23, 1915, the libel was amended so as to claim damages of $1,793,278.22. Fol. 20.

The Answer.

The answer admitted the receipt of the gold to be carried to Plymouth, England, fol. 23, and thence to London, but claimed, fols. 28, 29, that the carriage was subject to certain conditions in the bill of lading issued for the shipment "and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of an European war."

The prepayment of freight of $9,268 was also admitted. Fol. 30.

It is alleged that the steamer turned back on her course when 1070 miles from Plymouth, and proceeded to Bar Harbor and thence to Boston. Fols. 31, 32.

The answer claims that the decision of the master of the steamer to return to the United States was based on creditable information received in a wireless message from the home office at Bremen that war had broken out involving Germany, with Russia, France and England and that this furnished reasonable ground to the master to apprehend that the steamer and cargo would be captured if the voyage was continued, and that sound judgment and discretion required him to put back to a port or refuge. Fols. 33, 34.

It is alleged that even if war had not actually broken out when the wireless message was received, yet in anticipation of the outbreak of hostilities the master would have been justified in adopting the precise course that he followed. Fol. 35.

The answer admitted that redelivery of the gold was accepted by the libelant under an agreement, Exhibit B annexed to the answer, fol. 36, but denied that the steamer had violated her duty, fol. 35, or that the libelant had suffered damages. Fol. 37.

As a second defense the answer alleged the cost of the steamer, fol. 39, and that on July 28, 1914, she sailed from New York with gold and silver of the declared value of more than $11,000,000, the shipment of which had been given great publicity, and that "the captain of the *Kronprinzessin Cecilie* had good reason to believe that the cruisers of Russia, France and Great Britain would make every effort to capture so rich a prize." Fols. 40, 41.

The answer alleged that while the steamer was proceeding on her voyage a general war broke out in Europe in which Germany was involved "and owing to the danger of capture if she proceeded on her voyage" on the evening of July 31, 1914, when 1070 miles from Plymouth she turned back and put into Bar Harbor. Fols. 42, 43.

It is alleged that the return of the steamer was a justifiable precaution and "was based upon reasonable ground for apprehension of capture and was the performance of an obvious duty which the master owed to his owners, to the passengers and crew, and to the cargo owners, and was a measure adopted by him in good faith in the exercise of his best judgment and discretion for the benefit of all concerned." Fol. 44.

Allegations of political events are then made and that a state of war existed between Ger-

many, France and Russia before the date of arrival in due course of the vessel at Plymouth or Cherbourg, and that the vessel would have been seized by the French authorities on arrival at Cherbourg. Fols. 45, 46.

It was alleged that thus it was impossible to reach Bremerhaven "by running the gauntlet of the French and British fleets through the British Channel." Fol. 46.

Allegation was also made that if the steamer had proceeded directly to Bremerhaven without touching at an English or French port, the gold consigned to France and England would have been seized by the German Government. Fol. 47.

It was also alleged that the wireless message from the home office to the master was withheld until the last possible moment until it was apparent that if she were permitted to proceed further she would not have sufficient coal to reach a port of refuge. Fol. 50.

It is then alleged that the action of the master in returning to the United States was in concurrence with the instructions received from the owners and "such instructions and the action following them were fully justified by the circumstances and were the exercise of a right given by the laws of the United States as well as by Article 634 of the Maritime Code of the German Empire" under which, if war is declared after the commencement of a voyage and in consequence a vessel can no longer be considered free and would be liable to risk of capture, either party might withdraw from the contract. Fols. 51, 52.

The answer claims that the action of the master was successful and the delivery of the specie

was accomplished "without the capture or detention of a single passenger or member of the crew, and without loss of or damage to any of the specie or mixed cargo." Fol. 53.

Under the third defense it was alleged that the bill of lading provided that the steamer should not be liable "for loss or damage occasioned by arrest and restraint of princes, rulers or people. Claimant further alleges that if the libelant has in fact sustained any damage the same was occasioned solely by the cause so excepted." Fols. 54, 55.

The fourth defense alleged that under the bill of lading the vessel should not be responsible for more than the declared value of the gold and on redelivery of this gold to the libelant, claimant's responsibility ceased. Fols. 56, 57.

The fifth defense alleged that time was not of the essence of the contract and that by the bill of lading, steamer should have "liberty to call at intermediate ports or any port or ports in or out of the customary route in any order to receive and discharge coal, cargo, passengers and for any other purposes," and that the steamer should have liberty to put into a port of refuge and should not be liable "for loss or damage by prolongation of the voyage." Fol. 58.

Decision of the District Court.

The District Judge in a long opinion dealt with the pleadings at length and with various facts and historical events covered by stipulation between the parties.

The Court then considered the wireless message sent by the owners to the master and re-

ceived by him on July 31st giving the false information that war had broken out with England, France and Russia and to return to New York. The Court held that this false message of the owners that war had broken out, when they merely considered that war was imminent, fol. 1593, "cannot be held to have been an untruthful one in that it was calculated to deceive, or in that it tended to cause Captain Polack to take action which he ought not to have taken," fol. 1594, and that the directors were justified in sending their message. Fol. 1595.

The conclusion of the Court justifying the action of the master is summarized in the two paragraphs at the end of the opinion, fols. 1603, 1604, as follows:

"I have already found that, in turning his ship about, the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril; that, in view of his knowledge, and of credible information received by him, he did as a prudent shipmaster should have done.

"I come to this conclusion, without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under the maritime law."

Decision of the Court of Appeals.

The Circuit Court of Appeals, consisting of Putnam, Dodge and Bingham, *JJ.*, reversed the decision of the District Judge.

Opinions for reversal were written by Judge Dodge, p. 435, and Judge Bingham, p. 447, and there was a dissenting opinion by Judge Putnam, p. 459, for affirmance.

Judge Dodge first dealt with the false message sent to the master by the shipowners on July 31st at 2:45 P. M., which "consisted of the peremptory order 'turn back to New York,' prefaced by the statement 'war has broken out with England, France, Russia,'" and said, "Neither at the time it was sent nor at the time it was received was the statement true as to either of said countries." P. 436.

Judge Dodge then said, p. 436:

"The master obeyed the order to turn back instantly before revealing the substance of the message to any other person on board."

Judge Dodge pointed out that the master is ordinarily the owner's representative for the purpose of effecting the safe carriage and delivery undertaken by the ship, and as such is a stranger to the cargo. He referred to a possible discretion vested in the master in circumstances of unexpected emergency, p. 437, and found that there had not been any actual exercise of discretion by the master, but rather, p. 438, that there was an unqualified order in the message to turn back and "that the instant obedience given that order by the master was the only course really left open to him or intended to be left open to him by the message."

The opinion then stated, p. 440:

"If, therefore, the abandonment of the contracts undertaken by these bills of lading can be justified at all, it must be justified as the owner's act; and the question is whether or not circumstances are shown which excuse non-fulfillment on the owner's part."

Judge Dodge then dealt with "the only exception contained in the contracts for delivery of "the specie which is relied on for the purpose "of exonerating the owner," and this was "arrest and restraint of princes, rulers or people." He stated, p. 442, that it was settled law that the arrest and restraint which would excuse failure to make delivery under the contract must be actual and operative, "and that no merely expected and contingent restraint affords sufficient excuse."

The circumstances under which the owner abandoned the voyage were considered, and it was found, p. 445, that

"unless something had happened to delay the ship such as is not shown to have ever happened on any of her numerous prior voyages to the same ports, the specie to be delivered at Plymouth would probably have been delivered there by 1 A. M. on August 3, 1914, and that for delivery at Cherbourg by 8 A. M. on the same day. * * *

"So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31st, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose."

Accordingly Judge Dodge held, p. 447, that the libelant was entitled to recover its damages from the steamship.

In a concurring opinion for reversal, Judge Bingham considered, p. 448, the various contentions of the claimant put forward by way of

defense, and concluded that none of the claims was right as applied to the facts in these cases.

Judge Bingham found, p. 449, that when the master received the false message he "acted on the idea that he was relieved from exercising his discretion as to the course the ship should take, if he had coal enough to obey the order to return to America."

Accordingly it was found, p. 451, that the master's "course of conduct on the evening of "the 31st of July in turning back to America "was not due to the exercise of discretion on "his part, but was due directly to the order of "his superior and in obedience thereto."

Further, however, Judge Bingham found that if it could properly be considered that the master did exercise any discretion, the claimant could not avail itself of the master's decision as a defense, for "the information which the man- "aging directors gave was false. * * * To per- "mit the claimant to avail itself of the master's "decision obtained under such circumstances "would be the equivalent of according to one "the protection of a judgment which he had "procured through fraud. That such was the "purpose of the managing directors in sending "the telegram is plainly deducible from the evi- "dence presented by the record." P. 451.

Therefore, it was found, p. 452:

"The conclusion is irresistible that the tele- gram was primarily an order, and the infor- mation it gave as to the political situation was purposely false and so framed that the master would be compelled to obey the order whether he wished to exercise his discretion or not."

Judge Bingham then considered whether, apart from the exceptions contained in the contracts, the shipowner could justify its conduct in ordering the ship to return to America because of the threatened danger of war, and it was found, p. 454:

"This case clearly shows that the claimant, being one of the principals to the contract of carriage, had no discretionary authority vested in it by which it could justify an abandonment of its contract obligations in case of the threatened danger of war."

Judge Bingham then dealt with the exceptions in the bill of lading of arrest and restraint of princes, rulers or people, and held that the vessel's "return to America was not due to any "restraint of a sovereign act, legal or physical; "but was to avoid a supposed future peril to "which it might become subjected." P. 456.

Judge Putnam, in his dissenting opinion, said, p. 465, that it was unnecessary to cite authorities, as the law was too well settled that

"it was not only the right but the duty for the master of this ship not to delay and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture and to have due regard to the uncertainties of the ocean and leave reasonable margin for the state of the weather and for accidental detentions; and under the circumstances in this case the decision to turn back was justifiable, whether it came from the master or owners."

Reference was made to the recent case of *British & Foreign Marine Insurance Co.* v. *San-*

day, 1916, App. Cas. 650, where British vessels bound with cargo for Germany, after the declaration of war between Great Britain and Germany, put into a British port, and Judge Putnam said, p. 467:

"The case at bar would have been precisely within this decision if war between Great Britain and Germany had broken out before the *Cecilie* reached Plymouth, so that it would have been a violation of the law of Germany for her to enter that port. * * * Taking the case by and large, there cannot be said to be substantially any distinction between them."

He seems to have dealt with the case as though the principles that might have applied after an outbreak of war were applicable where there was merely an anticipation of war and possible future danger.

PRINCIPAL QUESTIONS PRESENTED ON THIS APPEAL.

1. Where a steamship as a common carrier receives cargo, issues a bill of lading containing an exception of arrest and restraint of princes, and receives freight therefor, is the shipowner justified in ordering an abandonment of the voyage because of a fear that if war should be declared the ship would be endangered?

2. In such a case are the shipowners justified in cabling admittedly false information to the master because of their fear that if they sent correct information he might not follow their instructions?

3. Can a shipowner claim the benefit of an alleged exercise of discretion by a shipmaster

based on false information sent to him by the shipowner?

4. Does an exception of arrest and restraint of princes in a bill of lading come into operation so as to excuse a common carrier from performing the contracted voyage where there is not any restraint in fact but the shipowner fears that there may be a restraint if war breaks out?

5. Does any principal of law justify a shipmaster of a common carrier in abandoning his voyage because of his supposition based on false information received from the shipowners that if the voyage should be continued the ship would be in danger of capture?

6. Under the circumstances of this case did not the abandonment of the voyage constitute a deviation so as to make the shipowner as common carrier liable as an insurer for all resulting damage?

7. Under our law can prepaid freight be retained by the shipowner where he voluntarily abandons the voyage?

Statement of Facts.

The material facts of the case are these:

On July 27, 1914, the libelant, the Guaranty Trust Company of New York, a New York corporation, shipped on board the German steamship *Kronprinzessin Cecilie* at New York, 93 kegs containing gold bars owned by the libelant, of the value at the time and place of shipment of $4,942,937.64. *Stipulation,* fol. 653.

The steamship was a regular liner carrying passengers and also cargo for all who offered it and had traded as a commercial vessel between New York, Plymouth, Cherbourg and Bremerhaven for a number of years. *Polack,* fols. 1156-1158. On this voyage she carried gold for two shippers, a miscellaneous cargo from various other shippers, and passengers. Thus she was a common carrier.

She had never been in any war service, but had always been used and held out to the public as a commercial vessel. She made regular sailings on a schedule advertised a considerable time in advance. Fols. 1157-1158.

The carrier undertook to transport the gold by the steamship *Kronprinzessin Cecilie* to the port of Plymouth, England, where it "will be landed," and thence to forward the gold at steamer's expense but at owner's risk to the libelant at London subject to the provisions of the bill of lading that was issued for the shipment. *Stipulation,* 654. A copy of the bill of lading is printed at page 17 of the record. Freight charges in the sum of $9,268 on the shipment were prepaid to the carrier, as specified in the bill of lading. *Answer,* fol. 30.

The only clauses in the bill of lading pleaded by the claimant as a limitation on the absolute obligation of the carrier to transport and deliver the shipment as above described are the exceptions of "arrest and restraint of princes, rulers or people," *Answer,* fol. 55.

The liberty to call clause and another providing that the steamer should not be liable for "loss or damage caused by prolongation of the voyage," were pleaded as excusing delay. *An-*

swer, fol. 59. It was not contended in the District Court nor or in the Court of Appeals that these clauses had any application to the circumstances of this case.

The steamer sailed from New York about 1 A. M., on July 28th, 1914. *Stipulation*, fol. 657. Germany was then at peace with the world.

The vessel proceeded on her voyage until 10.09 P. M. on July 31st when she was in the position of 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich. *Stipulation*, fol. 657. Her distance from Plymouth at that time was originally estimated at 1070 nautical miles. *Stipulation*, fol. 657. According to the computation of the Nautical Department of the North German Lloyd at Bremen, as given in the stipulation of May 27, 1915, the distance from Plymouth was actually 1057 nautical miles. *Stipulation*, fol. 1407.

About ten o'clock that evening a wireless message was received on board the steamship from the directors of the North German Lloyd at Bremerhaven in their private code. *Stipulation*, fol. 658.

When Captain Polack took command of the ship in May, 1913, *Polack*, fol. 967, he was given a sealed package with instructions to open it on receiving a wireless message relating to disease and signed Siegfried. *Polack*, fol. 999. The wireless message that the master received on the evening of July 31st was in German, related to disease and was signed Siegfried. *Polack*, fol. 1001. The message was:

"Erhard erlitt anfall von blasenkatarrh Siegfried."

The translation of the message is in these words:

"Erhard has suffered an attack of catarrh of the bladder." Signed, "Board of Directors of the North German Lloyd." *Polack,* 1012, 1020, 1021.

The master then cut open the sealed package and on referring to the private code that was enclosed found that the translation of the message into German was:

"der krieg ist ausgebrausen mit England, Frankreich, Russland. Kehrt zuruck nach New York."

The master translated the German into English as follows:

"War has broken out with England, France and Russia. Return to New York."* *Polack,* fol. 1023.

In fact the message was false. Germany was still at peace with all the world.

The directors say that they made the message intentionally false, fol. 1423, in order that there might not be any doubt of the action that the master would take on receiving the order.

Immediately after receiving this order from the owners the master turned the ship around to the West, *Polack,* fol. 1037, and proceeded toward New York.

The next day, August 1, at 9.40 P. M. the master received another wireless message, this

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*Literally the words "kehrt zuruck nach New York" are words of command and mean "*turn back* to New York." *Zuruck* means *back;* thus, "go back" is geht zuruck; "run back" is lauft zuruck; "fall back" is fallt zuruck.

time through the station at Sayville, Long Island, which was in the German Government Code and in translation was: "Threatening danger of war. Do not touch at a port England, France, Russia—Country's Naval Office." Fols. 1026, 1033.

This message was not pleaded in the claimant's answer and though put forward in the petition for certiorari is plainly an afterthought, and not of real materiality.

On the afternoon of August 3rd some message sent by the British Ship of War *Essex* was intercepted by the *Kronprinzessin Cecilie* and the master concluded to put into Bar Harbor and not to go to New York, in order to avoid a possible meeting with the *Essex*. *Polack*, fols. 1051, 1056.

The vessel arrived at Bar Harbor on August 4 and dropped anchor about 4 A. M. *Stipulation*, 664.

A few days later the master, reporting to his owners on the trip, said:

"We * * * steamed eastward on the prescribed course up to July 31 to 46° 46′ N., 30° 21′ W. Here we received *the order to return* which was immediately carried out. While the ship was still in the act of turning I directed that the passengers of the first and second cabin be requested to repair to the Smoking Room and when the ship was on the course to westward I went down and acquainted them with the fact that war had broken out and that I had *received orders* from my company to return to New York." Fols. 103, 104.

Four days after the arrival of the vessel at Bar Harbor the claimant redelivered to the libelant the 93 kegs of gold bars that the claimant had received at New York for carriage to England. *Stipulation*, 665.

The redelivery of this gold was made without prejudice to the claims of the libelant against the steamer, and her owners, for any acts or defaults on their part before redelivery of gold, and without any admission of liability on the part of the steamer or owners for such claim. Fols. 79, 80. The return of the gold was asked for on the understanding, not questioned by the claimant, that the continuation of the voyage to destination was indefinitely postponed. Fol. 70.

Subsequently, by arrangement between the parties and the Navy Department of the United States, the steamer was moved to the Harbor of Boston, fol. 664, where she now lies.

The libel of the Guaranty Trust Company of New York against the steamship *Kronprinzessin Cecilie* was subsequently filed in this court on October 21, 1914. Fol. 19.

Process against the steamer was issued under the libel and custody of the steamer was taken by the United States Marshal and still is retained by him.

Additional libels have been filed respectively on behalf of two passengers, Charles W. Rantoul, Jr., and Maurice Hanssens, who were on the steamer and have sued for damages sustained by reason of the carrier's breach of contract to transport them to Plymouth.

A libel has also been filed on behalf of the National City Bank of New York to recover damages for the breach of the carrier's obligation to transport and deliver two other consignments of gold, one to Plymouth, thence to be forwarded to London, and one to Cherbourg, thence to be forwarded to Paris.

The four cases were consolidated and tried together.

On these facts the respondent contends that none of the defenses set up by the claimant petitioner is made out.

The action of the master in returning to the United States was not an exercise of his discretion, but was taken because of "specific instructions," fol. 1040, sent to him on July 31, by his owners in a wireless message that contained the purposely false, fols. 1418, 1423, statement that war had broken out with England, France and Russia, and directed him to "return to New York." Fol. 1023.

The message was in its form an order and was so interpreted by the master. Fols. 103, 104, 1082, 1096.

There was not in fact "any arrest and restraint of princes, rulers or peoples" exerted against the steamer or her master.

Germany was not at war. In the absence of war there could not have been even any reasonable apprehension of seizure or capture; although that would not have been sufficient to constitute an "arrest and restraint."

An apprehension by the shipowners that if war should break out as they anticipated, their ship might run the risk of capture, is very far from constituting a restraint of people, much less an "arrest and restraint" within the language of the bill of lading.

In fact the master's action, which was the owners' action, constituted a wholly unjustified deviation, an abandonment of the voyage, and a violation of the common carrier's obligation with full liability on the steamship as an insurer against the resulting damage.

FIRST POINT.

THE KRONPRINZESSIN CECILIE WAS A COMMON CARRIER, LIABLE AS AN INSURER FOR FAILURE TO DELIVER THE LIBELLANT'S GOLD IN ENGLAND UNLESS EXCUSED BY THE TERMS OF THE BILL OF LADING.

The *Kronprinzessin Cecilie* had been employed for years in trading between New York and Plymouth, Cherbourg, and Bremerhaven, carrying passengers and cargo for hire for all who offered. She had always been used as a commercial vessel and was held out to the public as such. *Polack*, fols. 1156, 1158. On this occasion she carried, in addition to the gold shipped by the Trust Company and the Bank, a miscellaneous cargo of small value consigned to various persons. Fol. 491.

Accordingly she was a common carrier and was under all the liabilities of a common carrier except as modified by the contract of carriage.

As was said by Mr. Justice Gray in *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S., 397, at page 437:

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies."

The Supreme Court defined a common carrier and its duties in *Propeller Niagara* v. *Cordes*, 1858, 21 How. 7, 22, as follows:

"A common carrier is one who undertakes, for hire, to transport the goods of those who may choose to employ him, from place to place * * *

P. 23, "Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers and liable in all events and for every loss or damage however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier and expressly excepted in the bill of lading * * *

"In the absence of any special agreement his duty extends to all that relates to the lading as well as to the transportation *and delivery* of the goods; and for the faithful performance of those duties the ship is liable as well as the master and owners * * *

P. 27, "Kent, Chief Justice, said in *Elliott* v. *Russell*, 10 Johns. 7, decided in 1813, that it has long been settled that a common carrier *warrants the delivery of the goods* in all but the excepted cases of the act of God and public enemies and there is no distinction between a carrier by land and a carrier by water."

1 Parsons Ship. & Adm. 171 says:

"The shipowner undertakes and promises to carry in his ship the goods of the shipper to their destined port in safety, *by the proper route*, and *in due season*. This implies a promise that his ship is seaworthy in all respects, that it has a sufficient master and crew, who will take due care of the goods as to lading them on board, carrying and delivering them, and who will *navigate the ship to her destined port in the usual way, without unnecessary delay or deviation.*"

Moore on Carriers, p. 306 says:

"The liability of a carrier of goods is that of a common carrier which is that of an insurer, and in case of loss or injury to goods entrusted to it for transportation, no excuse avails such carrier except that such loss or injury was occasioned by the act of God or the public enemies or the sole fault of the owner or his agent."

The failure of the carrier to deliver the gold at Plymouth, and forward it to London in accordance with its contract, places upon the carrier the burden of proof of satisfying the Court by a preponderance of evidence that such failure was due to an excepted peril. *The Folmina*, 212 U. S., 354; *Clark* v. *Barnwell*, 12 How., 272; *Morrison* v. *Shaw, S. & A. C. Ltd.*, 1916, 1 K. B. 747, 758.

It is with reference to these well settled principles that the petitioner's rights and liabilities are to be adjudicated.

SECOND POINT.

THE CARRIER'S FAILURE TO COMPLETE THE VOYAGE AND DELIVER THE CARGO IS NOT EXCUSED BY RESTRAINT OF PRINCES OR OTHER EXCEPTIONS IN THE BILL OF LADING.

The petitioner has attempted to excuse itself by pleading three defenses, one entirely outside the bill of lading, and the others based on exceptions in the bill of lading.

The first defense is the contention that the abandonment of the voyage by the master was

an exercise by him of a wise discretion, *Answer,* 44, and was in concurrence with instructions received from the vessel's owners as contained in a wireless message. *Answer,* fol. 51.

The second defense is the exception in the bill of lading of "arrest and restraint of princes, rulers or people." With reference to this the answer says: "The claimant further alleges that if the libellant has in fact sustained any damage, the same was occasioned *solely* by the cause so excepted." *Answer,* fol. 55.

The third defense is that time was not of the essence of the contract; and in connection therewith the answer alleges that the bill of lading provided that the steamer should have "liberty to call at intermediate ports or any port or ports in or out of the customary route in any order, to receive or discharge coal, cargo, passengers and for any other purposes," and also that it was understood and agreed the steamer should have liberty to put into a port of refuge, and should not be liable for "loss or damage by prolongation of the voyage." Fol. 58.

We shall first consider the defenses under the bill of lading.

I. The voyage was not abandoned because of "arrest and restraint of princes."

a. The master received specific and definite orders from his owners to abandon his voyage.

On July 31, 1914, at 10 P. M. ship's time, 11:45 Greenwich time, the master received a message in the German language through the British wireless telegraph station at Poldhu, a translation of which is as follows:

"Erhard has suffered an attack of catarrh of the bladder." Signed "Board of Directors of the North German Lloyd." *Polack,* fols. 1012, 1020, 1021.

The language of the message when interpreted into German by the secret code that had been delivered in May, 1913, to the master by his predecessor in command, *Polack,* fol. 967, was found by him to be:

"War has broken out with England, France and Russia. *Return to New York." Polack,* 1023.

The literal translation of his instruction was:

"Turn back to New York." Fol. 240.

b. This message was designedly false in its statement of fact, for war had not broken out between Germany and England, France or Russia, or between any two.

It might be supposed that the false statement was due to a paucity of phrase in the secret code which might not have permitted the use of words that would exactly fit the existing conditions. In fact, though, the code did contain words that would have enabled the German owners to describe the situation exactly.

Indeed the very first word in the private code in German is "Armin" and this means "war threatens with." *Polack,* fol. 1072.

Separate words then follow to indicate England, France and Russia respectively. There were also words to indicate England and France, France and Russia, as well as England, France and Russia. *Polack,* fol. 1073.

Thus the German owners could have telegraphed that war threatened with England, or France, or Russia, or with all three, or with two of them. *Polack,* fol. 1074.

Indeed, the code was so comprehensive that the German owners might have telegraphed that war had broken out with France and Russia and was threatening with England, or that England was doubtful.

The enquiry which claimant's counsel put to the directors, as given at fol. 1417, asked why the message stated that war had broken out and not merely that war was imminent.

Counsel for the claimant may well have felt uneasiness and inability to understand why the German owners should have sent out a message which they knew to be false.

Opportunity was also afforded to the directors in the enquiry, if the directors believed war had actually broken out, to state the facts on which their belief was based. The helpful query was also made whether the limitation of the code had anything to do with the form of the message. Fols. 1417, 1418.

The German directors obviously could not maintain so late as 1915 that the statement in their message was correct. They have given, however, a curious but illuminating explanation of their state of mind when they sent the message.

They considered, first, that war could be expected within 24 hours, *Stipulation,* fol. 1419, and second that any statement of the situation as it actually existed was inadvisable "and could only lead to misunderstanding and unsafe resolutions." *Stipulation,* fol. 1420.

In their opinion only the false information that war had already broken out would lead the master "to observe in the further guidance of the vessel the deportment and care which we

considered absolutely necessary here." *Stipulation,* fols. 1420, 1421.

Further they suggested that owing to possible delay in the transmission of the telegram, if war should actually have broken out in the interval, "it would most probably have been impossible for us to advise the vessel of this." *Stipulation,* fol. 1422. Thus they said:

"The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code." *Stipulation,* fol. 1423.

Slight comment need be made on the mental attitude of these German owners. They could not trust the master of the steamer to act in accordance with their wishes if they told him the truth; therefore in order that there should not be any possibility of his varying from their instructions they purposely told him what was false.

Even then, however, they did not leave it to the master to do what he might consider necessary if he should assume that what was told him was true.

They ordered the master to return to New York. Their statements at folios 1418-1423 show that they intended that the master should take their instructions as an order.

Furthermore, the directors say in their prepared statement that they intended "to recall the *Cecilie,*" and that the ship "*turned her course on the basis*" of "*our telegram.*" Fols. 1404, 1406-1407.

For further assurance the owners repeated their order by wireless from Bremen to Sayville, and on August 2nd at 11 P. M. the master received a second message in confirmation of the first and in the same terms. *Polack*, fols. 1024, 1025.

Counsel for the shipowners treated the message as an order, for their question to the owners at fol. 1387 said:

"We wish to prove that the recall of the steamship *Kronprinzessin Cecilie* was the exercise of a reasonable discretion and judgment."

At fol. 1401 the owners speak of their resolution "recalling the *Cecilie* to New York."

At fol. 1402 they speak of "the recall of the *Cecilie.*"

At fols. 1404-1405 they refer twice to what they said induced them to recall the *Cecilie.*

At fol. 1406 they speak of the ship's position on July 31st, "when the ship received our cablegram and turned her course on the basis thereof."

Finally, at fol. 1408, they give the list of their various vessels, "which, in expectation of the breaking out of the war, we *ordered* to neutral ports by wireless telegrams." That list is printed at page 354 of the record, and includes the *Kronprinzessin Cecilie.*

Indeed, the mandatory language of the message does not leave any doubt that it was intended as an order.

In the Circuit Court of Appeals, Judge Dodge, in referring to the message and the statement that war had broken out, said, p. 437:

"There can be no doubt that the owner meant him to act upon it as if it were true, coupled as it

was in the message with the unqualified order to turn back. I can see no reason to doubt that the instant obedience given that order by the master was the only course really left open to him or intended to be left open to him by the message."

Judge Bingham took the same view, pp. 445-446.

c. The master accepted the message *as an order* and he acted accordingly.

Immediately after the message had been received the master informed the passengers that he had been *instructed* by a wireless notice to return at once to America. Fol. 907.

Soon after arrival at Bar Harbor the master wrote to his owners that on July 31st,

"We received the *order to return* which was immediately carried out"

and that he called the passengers together

"And acquainted them with the fact that war had broken out and that *I had received orders* from my company to return to New York." *Claimant's Answer to Interrogatories*, 103, 104.

The testimony of the master in Court shows also that unless and until he received the order from the owners he never intended to abandon his voyage.

He says that while in New York he did not receive any communications bearing on this voyage from the owners in Bremen. *Polack*, 1196. From the sources of information that were open to him while in New York he did not believe that war would result as he thought that the German Emperor would do what he could to avert war. *Polack*, 1199, 1200.

Previously to the receipt of the message of July 31st the master had not obtained during the voyage any news about developments in the situation except the information that was published in the *Ocean Gazette* on board the steamer and printed in the record, pp. 229-233. *Polack*, 1109, 1110. He had sought information from passing ships, fol. 1079, as he "was very anxious to receive exact news about the situation." Fol. 1080.

On July 30th he asked the German steamship *George Washington* if they had any war news and was told that they had only the news that he also had. Fols. 1080, 1081. This did not satisfy the captain for, as he said, fol. 1081, "I wanted really to have any information from a friend so that I could act and do what I had already said on the preceding day to our chief officer, 'I wish we could go back and avoid all this trouble on the other side.' "

He spoke about it again to the chief officer in the afternoon and after dinner, but did not feel justified in turning the ship back. He said, fol. 1082:

"But as no definite news were coming forth *I could not possibly act on my—just on the papers which the press gave*—only they were very alarming." Fol. 1082.

"Q. As a result of this conversation that you had on the bridge with your officers you reached the decision to keep on to Plymouth? A. Certainly." Fol. 1086.

"Q. But pending that information you were still going on? A. I was still going on." Fol. 1088.

"Q. And at the time you had this message your boat was still headed for Plymouth? A. Yes, sir.

"Q. And making the usual time? A. Yes, sir." Fol. 1079.

Captain Polack properly felt bound to obey the owner's order by wireless, countermanding his original instructions to proceed to Plymouth, even though he had almost immediate reason to believe that the statement in the message about the breaking out of war was false.

The message from the owners was received about 10 o'clock, ship's time, on July 31, or 11.45 Greenwich time. *Polack,* 1003-1004. Thirty minutes later, or fifteen minutes past twelve, Greenwich time, when the steamer had just about been turned round, the master received a message from the *Kaiser Wilhelm II,* which was going from Europe to New York. *Polack,* 1113-1114.

This vessel is a sister ship of the *Kronprinzessin Cecilie.* Fol. 1139. She had been repairing at Southampton, fol. 1138, and when she gave the message to the *Kronprinzessin Cecilie,* could not have been very far away. Fol. 1134. This message was in these words:

"Threatening danger of war is not declared but take precautionary measures." Fol. 1129.

The master considered that the word "war" should have been repeated in the message. Fol. 1118. The message is, however, complete in itself, and evidently meant that a decree of drohende Kriegsgefahr [threatening danger of war] had not been issued.

This message had been mentioned by the master to his counsel on the day before the master testified in court. Fols. 1120-1123. Although the master was asked on his direct examination if

he had picked up any other messages on the way back, fol. 1042, this very significant message from the *Kaiser Wilhelm II* was not disclosed until the master was cross-examined.

Thus, before the master had actually done more than get under way, after abandoning the voyage to Plymouth, he had reason to know that war had not been declared, and therefore, that there could not then be any justification whatever for refusing to complete his voyage.

The master, however, was acting under orders. As the Court said during the trial, fol. 1040, "he had specific instructions."

Where specific instructions are given by those in authority, discretion is not left to subordinates.

It cannot be contended, therefore, that anything in the existing political conditions exerted any pressure on the master, as a result of which he abandoned the voyage.

The false statement in the message that war had broken out could not take the place of an actual war. Therefore, if the propriety of the master's conduct in abandoning the voyage is to be judged by the existing facts known to the master, the defense necessarily fails, for there was not any act of a Government that caused the master to abandon his trip.

The claimant thus is forced to fall back on the proposition that the situation is to be judged by the circumstances that were known to the owners, and that these circumstances in fact constituted a restraint of princes.

We think there is not any warrant in law for such a proposition, but if there were the facts in this case would not avail the claimant, for they were not sufficient to constitute arrest and re-

straint of princes, so as to bring the exception into operation.

II. There was not any "arrest and restraint of princes" exerted against the steamer or her owners.

a. It must be emphasized at the outset that the libelant did not agree that the shipowner should not run any risk in making the voyage to Plymouth. The political tension on the morning of July 28, when the ship sailed, was scarcely less great than it was on July 31, when she turned back.

The claimant laid great stress in the court below on the political situation that existed previously to the date of sailing. The District Judge has also incorporated in his opinion a considerable review of historical events both before the steamer sailed from New York and thereafter.

The recital by the District Judge seems to have been made as a basis for his suggestion that the facts within the master's knowledge "tended to the conclusion that his country was upon the very edge of war with Russia, France and England." Fol. 1549.

If the political facts known by the master on July 27th persuaded him and also the owners that Germany was on the brink of war with Russia, France and England, yet the owners were apparently willing to take the chances of completing the voyage, for they accepted the libelant's gold and contracted to deliver it at Plymouth.

It undoubtedly was the case that on July 27th the political tension was severe and it seemed that unless one or more of the powers receded from their announced attitudes, war would be

likely to follow. There is nothing, however, in the situation as shown in the Stipulation as to Facts between the parties that indicated whether the war that might occur would involve France or England, nor how soon, if at all, it would break out.

The historical circumstances mentioned in the stipulation serve to emphasize the fact that the North German Lloyd Company with full knowledge of the possible political dangers of a serious character, undertook to transport and deliver the libelant's cargo without any exemption of political dangers but subject only to the danger of "arrest and restraint of princes."

In this posture of affairs, the claimant received from the libelant a large freight, in consideration of which it agreed to transport and deliver the gold at Plymouth and forward it to London. If any risks would be incurred in this operation, other than those which were expressly excepted in the contract of carriage, the claimant assumed and was bound to run them. The risk of what the Directors call "an expectation of the breaking out of the war" on the basis of which they ordered *this* steamer and all their other steamers into neutral ports [fol. 1408; see also list including this steamer printed on p. 354] before the steamer should reach Plymouth, was one of the risks that the claimant did not except, and which it therefore undertook to bear.

The exemption which the carrier pleads as the "*sole*" cause of libelant's damage, fol. 55, is found among a lot of other exceptions in paragraph numbered 1 of the small type of the bill of lading, which reads:

"The steamer and carrier shall not be liable for loss or damage occasioned by perils of the

sea or other waters, by fire from any cause or wheresoever occurring by barratry of the master or crew, *by enemies*, pirates or robbers, by acts of theft on land or sea; *by arrest and restraint of princes, rulers or people* * * * "

The exception of "enemies" and "arrest and restraint of princes," is thus found in juxtaposition with other exceptions dealing with loss or damage caused by violence or by uncontrollable forces. It is, of course, to be construed as *ejusdem generis* with the other excepted causes; that is, it is to be limited to *actual* arrests and restraints by force, or to steps taken to avoid the *reasonable certainty* of an arrest and restraint by force, in case the voyage should be continued.

The exception is somewhat narrower than that which appears in certain of the cases. In *The Styria*, 1901, 186 U. S., 1, for example, the exception was merely "restraints of princes." In the present case, the carrier, writing his own exception, attempted to relieve himself only from "*an arrest and restraint* of princes, rulers or people." As was said in *The Caledonia*, 157 U. S., 134, 137:

"As the exceptions were introduced by the shipowners themselves, they are to be construed most strongly against them * * * Their meaning ought not to be extended to give the shipowners a protection which, if intended, should have been expressed in clear terms."

To the same effect: *Compania* v. *Brauer*, 168 U. S., 104, at p. 118; *Carver, Carriage by Sea*, 5th edition, Section 77.

It is not open to the Court, therefore, to broaden the exception by interpretation so as to make it read "arrest *or* restraint of princes." It

will protect the carrier only if there was an *actual* arrest *and* restraint of princes, or a *moral certainty* that the vessel would have been arrested and restrained in case she had proceeded on the voyage.

b. It is much more than a technical objection that the claimant here has not set up any facts which it claims constitute an arrest and restraint, or the moral certainty of an arrest and restraint.

The claimant in its answer has extended at great length a recital of political events and other matters which perhaps are calculated to create atmosphere but have little or no application to the issue.

Thus it is said at fol. 29 that the shipment was not only covered by the terms of the bill of lading but was

"Subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of an European war."

We think that this allegation is incorrect whether it be considered as a statement of fact or a conclusion of law. Certainly the suggested condition does not appear in the bill of lading which the claimant says was accepted as the contract of carriage. Fol. 29. Neither the outbreak nor the threatened outbreak of an European war that might prevent the vessel from completing her voyage, would be an excuse to the carrier for its failure to perform its contract, unless the circumstances were brought within the exceptions in the bill of lading.

At fols. 33-34 in the answer, it is pleaded that the message that the master received on the evening of July 31st furnished reasonable ground for the captain to apprehend that the steamer and cargo would be captured if she continued her voyage, and the message required him to put back to a port of refuge.

We show elsewhere that the master did not assume to exercise any discretion and if he had done so, the owners could not claim the benefit of it since it would have been founded on a false message transmitted by them to him. *Post.*

It is then pleaded, fol. 34, that even if war had not actually broken out, the mere anticipation of the outbreak of hostilities and possible consequences to the ship, cargo and passengers would have justified the master in adopting the precise course which he pursued.

This allegation is merely an argumentative suggestion that is entirely without the support of authority.

At fol. 41 of the answer it is pleaded that by reason of the publicity given to the shipment of a large amount of specie on a very valuable vessel,

"The captain of the *Kronprinzessin Cecilie* had good reason to believe that the cruisers of Russia, France and Great Britain would make every effort to capture so rich a prize."

This oratorical apprehension could exist only in the event of war. The master does not say that he ever had such an apprehension. The shipowners were not justified in feeling such an apprehension. There was no war at that time between Germany and any one of the other nations mentioned. A court of justice cannot be asked to

presume that enlightened nations are reasonably certain to commit acts of war on the property of another nation, with which they are at peace. Such action would be contrary to international law and violative of the usages of civilized countries. The decision in the case of the *Prinz Adalbert*, 1916, p. 81; 32 Times L. R., 378, shows that Great Britain was anxious that German ships should leave British ports on August 4, 1914, and not that efforts were being made to seize German ships in times of peace.

The answer then pleads, fol. 42, that

"While the steamer was proceeding on her voyage, a general war broke out in Europe in which Germany was involved."

In fact, Germany was not involved in any war until after the steamship had ceased to proceed on her voyage and was on her way to Bar Harbor.

It is alleged at fol. 45 of the answer that even if the ship had succeeded in reaching Plymouth and discharging her cargo and passengers for that port and had been able to leave without interference by the English authorities, she would have been in a most critical position with reference to the hostile fleets.

But there was not any *hostile* English fleet in the Channel until after August 4 at 11 P. M. and there is not any proof that there was any hostile French vessel there previously to that date.

The only evidence in the record about the location of the French fleet is the announcement of Sir Edward Grey on August 2, that "the French fleet had long been concentrated in the Mediterranean." Fol. 826.

The additional suggestion at fol. 46 that the Russian fleet was a factor which was necessarily considered by the master in making his decision is not supported by the proofs. As the captain said, fol. 1091: "The Russians never got out of the Baltic."

We refer later to the evidence showing that in all human probability and in the absence of any untoward circumstance, the ship would have been able, in ordinary course, to deliver her cargo and be hours on her way from Cherbourg to Bremerhaven before any actual war began or danger of capture or detention could arise.

The statement at fol. 50 of the answer that the wireless message to the master was withheld until the last possible moment until it was apparent that if she were permitted to proceed further she would not have sufficient coal to reach a port of refuge, is supported only by an incredible statement by the Directors of the North German Lloyd. They said, fol. 1394:

"Upon instructions of the Board of Directors the Nautical Department figured out exactly what was the latest time that the vessel would have to receive an order in regard to the continuation or interruption of her journey, and we reached the conclusion that, according to the supply of coal on hand and the duration of the trip in question, the Board of Directors would have to come to a decision in regard to this by latest during the early hours of the afternoon of Friday, July 31st."

The enquiry was put to the directors by their counsel, fol. 1406, as follows:

"Q. What director can testify as to the watch which was kept on the progress of events and that the *Cecilie* was not ordered to return until her coal had been reduced to the minimum which would permit of her returning? A. The computations of our Nautical Department are as follows: On July 31st at 10:09 P.M., when the ship received our telegram and turned her course on the basis thereof, the ship was 46° 46′ N. Latitude and 30° 21′ W. Longtitude; the distance to Plymouth still amounted to 1057 nautical miles, the supply of coal amounted to 2,902 tons. [The remaining computations deal with the assumed consumption of coal by the vessel under various contingencies for 48 hours after July 31st.]"

This answer was a statement of circumstances that could not have been known to the directors at the time, and is of a piece with their false message to the master on July 31 that war had broken out with England, France and Russia. The master has testified that he did not have any communication with his owners except the receipt of the message on July 31st; yet the owners assume to give the position of the steamer and computations with reference to coal on board, as made on or before July 31st, that could have been ascertained only after they received a report from the master.

We deal with the argument based on the coal supply subsequently.

The directors sought to bolster their statement about the watch kept on the progress of the voyage by the suggestion, fol. 1396, that the delay in the transmission of their message to the master

"actually resulted in the fact that the *Cecilie* could no longer return to New York in compli-

ance with our order, but had to select the shorter route to Bar Harbor."

The real reason why Captain Polack went to Bar Harbor, as he gave it, was to avoid the possible proximity of the *Essex* near New York or Boston. If he had not been misinformed as to the outbreak of war he would not have apprehended danger from the proximity of the *Essex,* and doubtless would have continued on to New York. No British cruiser touched any German vessel until after the formal declaration of war on Aug. 4th. The captain does not suggest that the question of coal had anything to do with his decision to make for Bar Harbor.

Furthermore, there is a piece of evidence in the record which shows that the statement by the directors is wholly untrue, where they suggested that they withheld the wireless message until the last possible moment so that if she were permitted to proceed further she would not have sufficient coal to reach a port of refuge.

In their answer to the fourth question propounded to them they said:

"We attach an accurate statement of all of our vessels which, in expectation of the breaking out of the war, we ordered to neutral ports by wireless telegrams." Fol. 1408.

That list is printed at page 354 of the record, and shows that the orders recalling the *Kronprinzessin Cecilie* were sent at 2:45 P. M. on July 31st, when, according to the statement, she was in the middle of the Atlantic.

It will be observed, however, that at 2:40 P. M. on the same day similar orders were given to the

Grosse Kurfuerst, which was only one day's journey from New York.

At 2:55 P. M. on the same day similar orders were given to the *Friedr. der Grosse*, which was described as two days' journey from Baltimore.

Similar orders were apparently given to various other vessels on the same day, and indeed on the previous day.

It is therefore a demonstration that the order of recall to the *Kronprinzessin Cecilie* was given for general prudential reasons that caused the directors to give similar orders to all their other vessels, no matter what their position was geographically, and wholly without regard to any question of coal supply or availability of the steamer for reaching a port of refuge.

The incident is instructive as showing that the truth was not in the directors in 1915, when they made reply to their counsel's inquiry, any more than it was in them in July, 1914, when they sent the wireless message to the master.

It is also stated in the answer, fol. 52, that the master was entirely successful in returning to a port of refuge and delivering the specie and passengers without loss, capture or damage.

It is not apparent why it should be suggested that the master or the claimant was entitled to credit in escaping an imaginary capture or detention, unless, perhaps it was considered creditable that the passengers and cargo arrived safely in the country from which they started after having been subjected to the possibility of marine perils for several days longer than would have been the case if the contract of carriage had been performed.

Notwithstanding all these allegations calculated to describe the political tension that existed, there is not any allegation of facts that any specific events constituted an arrest and restraint of princes, rulers or people, or such a well founded fear of immediate arrest as would justify a deviation to avoid it.

The explanation cannot be sought in the ineptness of the pleading. It can only be found in the circumstances that it was impossible on November 27, 1914, when the answer was verified, and it is impossible now, to allege that any facts existing on July 31, 1914, constituted an arrest and restraint of princes, rulers or people that was exerted against the steamer or her owners within the meaning of the bill of lading.

The claimant has done nothing more than plead a conclusion of law.

If, however, it can be considered that the answer suggests that the facts referred to did constitute an arrest and restraint of princes, rulers and people, it must be equally ineffective on the facts and on the law.

The libelant contends that nothing short of an actual physical arrest of the steamer or the moral certainty of such an arrest if she had proceeded on her voyage to Plymouth, would have brought into force the clause in the bill of lading of "arrest and restraint."

The matter cannot be considered as if the bill of lading clause was arrest *or restraint*. Yet the entire defence under the bill of lading proceeds as if there was an exception of "restraint of princes" and the contention seems to be that the circumstances were such as to amount in law to

a restraint, and the owners were justified in ordering the master to avoid the supposititious restraint. Neither the facts nor the law support such a theory.

c. The directors of the North German Lloyd have assumed to give *the exact and only reason* that caused them to order the master to break up the voyage and return to the United States; and it was not a sound reason.

Their statement is contained in the stipulation that was made between counsel that the persons mentioned in the stipulation if called as witnesses would testify as therein stated. Fol. 1382. There was not any admission by the libelant of the truth of the testimony and the libelant objects on the ground of immateriality, irrelevancy and incompetency. Fol. 1383.

The German directors prepared their own recital and it is printed without any opportunity having been afforded to the libelant to cross-examine the directors on the remarkable statements that they made.

The directors, at fol. 1398, said that their interpretation of the political situation was a predominantly confident and hopeful one on July 30th.

They say that on Friday, July 31st, soon after 2 P. M. they received telegraphic information from one of their number who had gone to Berlin, fols. 1397, 1399, that a "declaration of the state of war for the German Empire owing to the 'threatening danger of war'" would soon be made public, and that they learned later that it was publicly proclaimed about 5 P. M. in Bremen. Fols. 1400, 1401.

Before the public announcement was made, however, and at 2:45 P. M. the directors sent the telegrams to Captain Polack "recalling the *Cecilie* to New York." Fol. 1401.

The directors then say, fol. 1402:

"The decree of the state of war for the German Empire, as quoted above, communicated to us by Baron von Plettenberg, offered to the members of the Board of Directors who participated in this resolution the immediate reason for the recall of the *Cecilie*.

"Compared with this decree of a state of war, all other political advices and facts which we had at the time, as expressed in the newspaper material, are only of secondary and minor importance of a commentary and explanation of this governmental decree, from which could be seen the causes and gradual developments of the conflict, and the enemies to be expected in case of the breaking out of the war, which, however, in itself, and without the supplementary act of the government in declaring the state of war would not, as yet, have caused us to take immediate action in regard to our vessels.

"Therefore this decree of a state of war alone can be designated as the decisive fact inducing us to recall the *Cecilie*.

"Consequently the explanation of all facts in detail requested is rendered unnecessary, as to what induced us to send off our telegrams, as they are only of secondary importance.

"Consequently the considerations which induced us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable."

Thus we have it that the defence of the directors under the bill of lading is placed solely on the contention that because they were advised that a declaration of a state of war for the German Empire would soon be issued, and they expected that within 24 hours thereafter war would break out, fol. 1419, they were justified in refusing to complete the voyage and their contract.

Their claim in effect is that they apprehended that war involving Germany directly, would break out sometime on August 1st and if it did, England or France or both would be immediately involved. If they should be, the *Kronprinzessin Cecilie* would run a risk of capture if she then should be less than two days steaming from Plymouth, as she would be if she were permitted to continue her voyage.

This proposition represents an accumulation of inferences on inferences. The inferences however are not legitimate; they were drawn not from established facts, but only from possibilities and conjectures.

The decree of *Kriegszustandes* did not amount to a declaration of war on any nation. *Stipulation*, fols. 754, 755. The word Kriegszustandes means simply "war standing," or, as we would say, "war footing." It had no other effect than to put Germany on a war footing. Fol. 755. She might have remained in that condition for an indefinite period. She did remain in it as regards France until 6.45 P. M. of August 3, and as regards England until 11 P. M. of August 4. For aught that the Directors had any right to assume, the very fact of Germany placing herself on a war footing might have led the other nations to accede

to her wishes; or, at least, such action might have induced negotiations that would have delayed the outbreak of war until long after the completion of this voyage.

d. It appears from another passage of the directors' statement that their real motive and purpose was to recall the steamer to New York on prudential grounds alone, entirely irrespectively of her contractual obligations and without regard to any actual present danger of an arrest and restraint, or condition of her coal supply precisely as they were dealing with their other ships, many of which were in port. This fact is inadvertently disclosed in the answer to the fourth question propounded to the directors:

"Q. What *other* vessels of the North German Lloyd were recalled, ordered to put back into neutral ports, or detained at Bremerhaven? What were the days and hours on which they were respectively recalled, and under what authority was the action taken?

"A. We attach an accurate statement of *all of our vessels, which in expectation of the breaking out of the war* we ordered to neutral ports by wireless telegrams." Fol. 1408.

The list attached to this answer is printed on page 354 of the record. In the middle of it appears the name of the *Kronprinzessin Cecilie,* which is stated to have been reached on July 31 at 2:45 P. M. "from the middle of the Atlantic".

It will be noted that the question related to "other" vessels; yet, in answer to a question which did not call for the information, the directors *volunteered* to put the *Kronprinzessin*

Cecilie in a list of vessels which they expressly state were recalled, not because war had broken out, as they falsely stated to the captain, but "*in expectation of the breaking out of the war.*"

e. Recalling the vessel and abandoning the voyage from fear or in the expectation that war might break out is quite a different thing from taking such a step to escape the moral certainty of an arrest and restraint.

The peril of arrest and restraint of princes excepted in the bill of lading had never begun to operate. The order of the directors to the master to abandon the voyage made it impossible that the excepted peril should operate.

Their action was taken to prevent the possibility that the excepted peril should come into existence and operate and not to avoid the consequences of an actually existing and operating peril.

An arrest involves an actual seizure and taking possession of a ship by hostile forces. *Per* Marshall, *C. J.*, in *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183, 189.

An arrest would constitute a restraint but a restraint would not necessarily mean an arrest.

A justifiable fear that an arrest and restraint will be exerted may, under certain circumstances, be equivalent to an actual arrest and restraint, but this can be true only in such cases as *Nobel's Explosives* v. *Jenkins* [1896], 2 Q. B. 326, where there was a practical certainty of arrest if the voyage should be continued.

The language of the clause certainly means that something more than a reasonable apprehension of arrest and restraint that may occur at some indefinite time in the future.

f. The law in America is clear that a defense to a breach of contract based by a carrier, on an exception of "arrest and restraint of princes" where there is not an actual arrest and restraint, but merely an apprehension, must establish that there was a *danger of capture that was imminent, apparently remediless and morally certain.*

This doctrine taken from *Emerigon,* Tom I, 507-512, was early established in this country by Kent, *C. J.,* in *Craig* v. *United Insurance Co.,* 1810, 6 Johns, 226.

That case was an action on a policy of insurance on the American ship *Amiable Matilda,* from New York to Barcelona. The vessel sailed in December, 1807, and was boarded during the voyage off St. Michaels by a British cruiser and an endorsement was made on her register warning her not to enter any port of France, Holland, Spain, Denmark, Italy, or Portugal. The commander of the British ship informed the master that in consequence of orders in council he would not be permitted to proceed to Barcelona without stopping at some British port. Accordingly, the master proceeded toward Gibraltar and on the way was informed by an American brig that the Algerians had declared war against the United States and had captured several American vessels. The master then put into Gibraltar, fearing otherwise capture by the British or the Algerians. He there obtained permission from the Government of Gibraltar to proceed to Barcelona and was about to do so when he was advised of the French and Spanish decrees, which were published in newspapers at Gibraltar, and was informed that Barcelona was occupied by French troops. He then abandoned the voyage

and returned to New York, and the insured abandoned to the underwriters as for a total loss.

Kent, *C. J.*, said:

"I proceed to consider the important question, whether the existence and notice of these decrees under the circumstances in which the ship was placed, at Gibraltar, when the captain broke up the voyage, created a technical total loss within the policy.

"The peril, if any, arising from the decrees, consisted either in the danger of capture, in the passage to Barcelona, or of seizure and confiscation after arrival there.

"I have no idea that the apprehension of capture *in transitu*, between Gibraltar and Barcelona, afforded a justifiable ground of abandonment. That proposition is wholly destitute of authority. It would lead to inconvenient and extravagant consequences, and *confound all distinction between imaginary or apprehended danger, and danger present and palpable.* In the cases cited by Emerigon, tom. 1, 507 to 512, in which a just fear of one of the perils insured against was held equivalent to *force majeure* and sufficient to charge the loss upon the insurer, *the danger was imminent, apparently remediless and morally certain.* Targa says, that a just fear is a species of violence and justifies an abandonment of the ship; and Emerigon admits the same thing. But the cases which are given, by way of illustration, explain what is meant by a just fear. It is a fear of being made a slave, or a prisoner, or of perishing in a case of extremity, or when defence becomes impossible. Thus the barque *Notre Dame des Reliques*, in coming from Candia, was met and pursued by a Turkish vessel of war, and the captain and crew, to avoid capture and slavery, for the vessel had been carrying warlike stores to a place besieged by the Turks, abandoned the ves-

sel and the insurers were finally, upon appeal, condemned to pay the *loss*. So, also, the *Marie-Therese* was stranded on the Barbary coast, and the crew, after laboring to relieve the vessel, abandoned her, for fear of being discovered by the subjects of the king of Morocco, with whom France was then at war. The vessel afterwards floated, and was recovered, and the insurers were held responsible for a proportion of the salvage. Again, the pink *Jesus-Maria* struck upon a rock, and the captain and crew, fearing to perish, escaped to the shore; a flaw of wind afterwards relieved the vessel, and she was conducted into port. This was held to be a case of just fear, and equivalent to the *vis major*, and the insurer was chargeable with the loss. On the other hand, a different decision was made in the case of the *St. Louis*, 1 Emerig. 594, which being much injured by tempests on a voyage from Marseilles to Martinique, put back to Marseilles, and was abandoned to the insurer on the ground that the ship returned from the fear of becoming altogether innavigable, and of shipwreck. The right of recovery was denied; because the incompetency of the vessel had not been pronounced by the competent tribunal, and because the fear of misfortune was not the misfortune itself.

"In *Lubbock* v. *Rowcroft*, 5 Esp. N. P. 50, Lord Ellenborough held that an abandonment, from an *apprehension* of capture, was not warranted by the policy; and this principle has received the sanction of Judge Washington, in the case of *King* v. *The Delaware Insurance Company*. There cannot be much doubt as to the correctness of the general rule. The only difficulty consists in the application of it to different cases. In one of the cases already mentioned, the vessel was abandoned, from an apprehension of capture; but the danger was so near and so certain as to

be equivalent to violence, and to justify the assured. I should doubt, also, of its application in the very case of *Lubbock* v. *Rowcroft;* for if it be discovered that the port of destination has fallen into the hands of an enemy, the danger of the voyage becomes imminent and certain. The voyage is broken up by actual 'restraint of princes.' It would be equally absurd and unlawful to pursue it.

"But, in the present case, the danger of capture, *in transitu,* was only contingent. *There was no reasonable certainty of capture.* A belligerent vessel might always be abandoned on that ground, without venturing on the ocean; for to such vessels, there is always more or less danger of capture, as there is of shipwreck. It is this very risk which the assured must encounter, and against which the insurer is to indemnify."

The Court then determined whether the abandonment could be supported on the ground communicated to the insurer of danger of seizure at Barcelona. The effect of the Spanish decree was considered, and it was said:

"It was, therefore, doubtful, whether the *Amiable Matilda* could, by any sound judicial decision, have been adjudged liable to seizure and confiscation, at Barcelona, under the Aranjuez decree. *But to make out a just ground of abandonment from this decree, it ought to have been certain that the decree applied to the case of this very ship; and it ought to be equally certain that it would have been put in force against the ship,* had she arrived at Barcelona, and before she could have anchored 24 hours, in good safety. If there existed a reasonable *doubt* of danger in both, or in either of these respects, the case did not amount to that *just fear,* which the authorities

cited by Emerigon, consider as equivalent to the application of physical force and violence. I cannot consider the danger of arrest and restraint at Barcelona, from this decree, to have been so certain and manifest, as to be, in any degree, a substitute for the arrest itself. * * *

"The captain, himself, did not consider the danger of arrest, at Barcelona, under the decree, as worth regarding; for he declared that he broke up the voyage from the danger of intermediate capture, and was persuaded that if the vessel had arrived at Barcelona the vessel and cargo might have been protected and saved, notwithstanding the decrees.

"We are, therefore, of opinion that the voyage was not broken up for any justifiable cause, or peril within the policy. The verdict is, consequently, against law, and must be set aside, with costs to abide the event of the suit."

A similar result was reached in *Corp.* v. *United Ins. Co.*, 1811, 8 Johns., 277, where the facts were altogether similar to those in *Craig* v. *United Ins. Co., supra,* except that the destination was Leghorn instead of Barcelona. The Court said:

"This case cannot be materially distinguished from that of *Craig* v. *The United Insurance Co.*, 6 Johns. Rep., 226. The voyage was voluntarily abandoned at Gibraltar, *from fear of capture,* by French and Spanish cruisers, if the vessel proceeded on her voyage to Leghorn. This is stated by the captain to have been the cause of breaking up the voyage; and it is a clear and well-settled principle in the law of insurance that the fear of loss is not the loss itself, and is no justifiable cause for abandonment. Nor was the apprehension of seizure and confiscation at Leghorn, under the Milan decree, if any such appre-

hension existed, sufficient to create a loss of the voyage. There is no evidence in the case that Leghorn was blockaded, or that neutral trade with that port was interdicted; and it was, at least, very doubtful, notwithstanding the decree, whether the ship in question could not have safely entered and discharged her cargo at Leghorn. * * *

"There was *no present or existing restraint. The captain was only menaced with danger in transitu.* The voyage to Leghorn was, therefore, voluntarily abandoned at Gibraltar, and the voyage to England voluntarily undertaken, from mere prudential considerations, with which the insurer had no concern."

This Court affirmed the principles of the two New York cases in *King* v. *Delaware Ins. Co.*, 1810, 6 Cranch., 71. The facts are disclosed in the opinion of Chief Justice Marshall, as follows:

"This suit was instituted on a policy insuring the freight of the *Venus* from Philadelphia to the Isle of France. The vessel sailed early in December, 1807, before the British orders in council, of the preceding November, were known in the United States. On the afternoon of the 16th of January, 1808, while prosecuting her voyage, she met the British ship of war *Wanderer,* by whom she was arrested and detained until the morning of the 18th, when she was restored to the captain, her papers being first endorsed with these words, 'Ship *Venus* warned off the 18th of January, 1808, by H. M. S. *Wanderer,* from proceeding to any port in possession of his Majesty's enemies. Edward Medley, second lieutenant.'

"The captain was verbally informed by an officer of the *Wanderer* that the Isle of France was blockaded, and that the *Venus* would be a good prize if she proceeded thither.

"The captain returned to Philadelphia, where he was disabled from prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by the *Wanderer,* he on that account abandoned to the underwriters.

"The principal question arising on this case is, *was the captain of the Venus justified in returning to Philadelphia,* after having proceeded about 1,000 miles on his voyage, either by the endorsement on his papers, or the verbal information given by an officer of the *Wanderer?* * * *

"The question recurs, *was the voyage broken up by one of the perils insured against,* or by the fault of the captain? * * *

"In proceeding to inquire whether the circumstances which actually occurred, justified the captain of the *Venus* in returning to Philadelphia, it becomes important to ascertain the real hazard of prosecuting his voyage. * * *

"It being found that the Isle of France was *not actually blockaded,* and the *orders not prohibiting the voyage;* it remains to inquire whether the *apprehension* excited by the warning, or by the verbal communication of a British officer, *justified the return of the Venus to Philadelphia.* * * *

"There did not, then, at the time the voyage was abondoned exist either in fact, or in law, the restraint or detention, against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure.

"Whether this might be justified under any circumstances it is unnecessary to determine. But the Court is of opinon that *the circumstances of this case did not justify it. The Venus might have proceeded, and ought to have proceeded, until she could obtain further information. It would*

be dangerous in the extreme if any false intelligence received on a voyage might justify a captain in acting as if that intelligence were true."

Judgment for the defendants was affirmed.

Again in *Oliver* v. *Maryland Insurance Company*, 1813, 7 Cranch., 487, this Court held that the danger must be *obvious and immediate in reference to the situation of the ship at the particular time* and *not merely contingent* and indefinite.

The action was on a policy of insurance on the ship *Snow Comet* at and from Baltimore to Barcelona, and at and from Barcelona back to Baltimore. On arriving at Barcelona, on July 25th, 1807, she remained 40 days under Quarantine; then went up to the City where she remained until January 8th, 1808. She then took on the principal part of her cargo at Salou, and sailed for Baltimore on January 28th, 1808, and was captured by the British and condemned. The defendants claimed that the delay at Barcelona, and the stopping at Salou constituted deviation, which defeated the plaintiffs' right to recover. The plaintiffs *attempted to justify* the delay at Barcelona, first, *on a reasonable apprehension of capture*, and second, on the usage of the trade. At the request of the defendants, the court had ruled that the fact that the *Comet* remained at Barcelona from December 1, 1807, to January 8, 1808, in consequence of the report that Algerian cruisers were seizing American vessels in the Mediterranean, would, if found by the Jury to be true, prevent the plaintiff from recovering. Judgment for the defendant was affirmed. On this subject, Marshall, *C. J.*, said:

"No doubt is entertained that the danger of capture from the Algerines, if proved to be real and immediate would justify the continuance in the port of Barcelona. And the apprehension of such danger, if founded on reasonable evidence, would produce a like effect. But in each case the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port, would become excusable, for there would always be danger of capture from the enemies' cruisers. Nor is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. *The danger, therefore, must be obvious and immediate in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent and indefinite.* In the present case it is not shown that there was any danger in proceeding from Barcelona to Salou. *No Algerine force is shown to be interposed between those ports.* Whatever might be the danger elsewhere, if there was none in proceeding to and remaining in Salou, it was the duty of the captain to have proceeded to that place, taken in his cargo and remained there for further information. *The captain was bound to have gone as far on his voyage as he could, consistent with the general safety.*"

Similarly it was held in *Smith* v. *Universal Insurance Co.*, 6 Wheaton, 176, that the peril must be immediate and act directly so that the loss must be the proper consequence. That case was an action on a policy of insurance on lawful goods on board the Schooner *Ellen Tooker*, on a

voyage from New York to ports in the Gulf of Mexico between Belize and Campeachy, and return to New York. The policy stated that it was on cargo consisting chiefly of munitions of war, and was warranted free from loss in consequence of seizure and detention in any illicit and prohibited trade. The schooner proceeded to Belize, and thence to another port, but finding it in possession of the Royalists, who would not permit her to enter, she put to sea, and fell in with a fleet under the command of an officer of the Independent forces, who agreed to purchase the cargo. On April 28th, 1817, the fleet, and the schooner, arrived off St. Ander, and anchored. On May 11th, the master went ashore to sell the cargo, and on May 18th, while he was still on shore Spanish warships appeared and the schooner escaped. She afterwards returned, on May 26th, and took the master back on board. After various other attempts to land the cargo in ports occupied by the Independents, this was found to be impossible owing to the fact that the Royalists had obtained entire possession of the Coast. The schooner therefore returned to New York where the owners abandoned to the underwriters. A judgment for the defendants was affirmed, on the ground that there was no actual restraint of persons acting under the authority of Spain, whereby the voyage was defeated. STORY, *J.*, said, p. 183:

"In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. *The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immedi-*

ate peril, and the loss the proper consequence of it; and *it is not sufficient that the voyage be abandoned, for fear of the operation of the peril.*

"The plaintiffs rely upon the fact of the *Ellen Tooker's* being chased away from St. Ander, and being prevented for several days from returning to that place by the presence of Spanish armed ships, as decisive proof of actual restraint. But the voyage was delayed only, and not broken up by this occurrence, for the vessel afterwards returned in safety to St. Ander. * * * In the present case the vessel actually did resume her voyage after the restraint ceased; and there is no evidence to show that any object of the voyage was defeated by this temporary restraint and delay to avoid capture. * * * It was clear, therefore, that a proceeding into St. Ander would have subjected the *Ellen Tooker* to confiscation for a double cause; for breach of the ordinary laws of trade, and for a violation of neutral duties. The voyage then was broken up from fear of loss, by reason of the seizure and confiscation of the property. *It was abandoned by the master quia timebat and not because there was any actual direct restraint, which prevented the vessel from proceeding to the port of destination.*"

The construction of a clause dealing with restraint of princes and its application to the facts of the case were considered by PARSONS, *C. J.*, in *Richardson* v. *Maine Ins. Co.*, 6 Mass., 102. This was an action on a policy of insurance on the cargo of a barque from Salem to Malaga, and covered the risks of arrests, restraints, and detainment of all kings, princes, and people. The barque sailed on December 11, 1807, and on January 3rd, 1808, was boarded from a Jersey priva-

teer, the commander of which warned the master not to proceed to Malaga or to any other port whatever, excepting in Great Britain, and advised him to return to Salem, as the safest thing to do, as the British orders in council of November 11th, 1807, had declared a blockade against the Spanish ports. The barque thereupon discontinued its voyage and returned to Salem, where she arrived on February 28th, 1808. The insured offered to abandon her to the underwriters and sued for a total loss under the policy. It was held that he could not recover.

PARSONS, *C. J.*, exhaustively discussed various questions involved, and said, p. 109:

"*But it cannot be admitted, that information at sea to a master of a neutral vessel, that her port of destination is blockaded, is of itself a restraint or detention of the vessel;* for this information may as well be received from another neutral vessel, as from a privateer belonging to subjects of the blockading sovereign. As to the warning not to proceed to the blockaded port, it cannot be material in this question; for the future danger or capture was not in any degree caused by the warning, but wholly by the knowledge of the blockade; for after this knowledge the barque, continuing her voyage to the blockaded port, would have been equally liable to capture and condemnation, as she would have been, had the notice only been given, and the warning to discontinue her voyage been omitted. * * *

"There remains for consideration one other point, arising out of the defence. It is made a question, *whether a well-grounded fear that a total loss will arise from one of the perils insured against, if the voyage be pursued, is itself a peril within the policy*, which will authorize the assured to abandon as for a total loss. The ques-

tion is stated on the supposition that the peril, from which the loss is feared, is insured against by the policy. And on the best consideration we can give this question, *we are satisfied that this fear of loss, thus stated, is not a peril within the policy.* It is not within the terms of the policy, on any reasonable construction that can be given to them. To admit it to be a peril insured against would be productive of much uncertainty, would open a door to frauds on the assurer, and would be repugnant to the principles recognized in the cases of *Hadkinson* v. *Robinson,* and of *Lubbock* v. *Rowcroft.* * * *

P. 120. "In the case before us the master, through fear of capture, discontinued his voyage, and returned home. But the fear of a capture, when the capture is insured against, cannot amount to a total loss, for which the owner may lawfully abandon; and *a fortiori* of such a capture as is not insured against.

"The conclusion is, that although a just fear of capture occasioned the loss of the voyage insured, yet that loss did not arise from any of the perils insured against by the defendants, and the plaintiffs cannot recover a total loss."

g. While these cases arose under policies of insurance, the clause of restraint of princes received the same construction that would be given to it in a charter party or bill of lading.

Thus in the *Xantho,* 1887, L. R., 12 App. Cas., 503, Lord Herschell in considering whether there was any difference between the words "peril of the sea" in a bill of lading and in a policy of insurance, said, p. 510:

"It would in my opinion be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words in two maritime instruments."

Lord Macnaghten said, p. 517:

"Whatever the expression 'perils of the sea' means in a policy of insurance, it means neither more nor less in a bill of lading."

See also *Hamilton* v. *Pandorf*, 1887, L. R., 12 App. Cas., 518, where Lord Watson said, p. 526:

"The expression has precisely the same significance in both cases."

And Lord Bramwell said, p. 527:

"I am of opinion that 'perils of the seas' is a phrase having the same meaning in bills of lading and charter parties as in policies of insurance."

See also the *G. R. Booth*, 171 U. S. 450.

In case of a deviation to avoid an arrest the shipper must be able to recover his loss either from his insurer, on the ground that the certainty of arrest which is thus avoided is equivalent to an actual arrest within the meaning of his policy, or from the carrier on the ground that the danger was so remote and uncertain that the deviation was not justified. As is stated in 1 *Parson's Ship and Adm.*, 172, note:

"It is well settled that, if the vessel deviates, and the cargo is insured, the risk terminates, and the underwriters are exonerated. It follows, as a necessary consequence, that the shipowners, having put an end to the contract existing between the freighter and the underwriter, should stand in the place of the latter, and assume all his risks."

h. The law in England on the subject accords completely with the decisions in our courts.

Perhaps the earliest authority in England is the case of *Hadkinson* v. *Robinson*, 1803, 3 Bos. & Pul., 388. That was an action on a policy of insurance on a cargo of pilchards on the ship *Paxaro* from England to Naples, covering risks of capture and detention of princes. The ship sailed from Falmouth on January 24th, 1881, under convoy. On March 5th she learned that English ships were excluded from all ports belonging to the Kingdom of Naples, and on March 16th, the commander of the convoy ordered the ship not to proceed to its destination but to Minorca for further information. The *Paxaro* arrived at Port Mahon, Minorca, on March 25th, where the report that British ships were excluded from the port of Naples was confirmed. The cargo was then surveyed and sold for a very small sum, and this action was brought to recover for a total loss. Judgment for the defendant was affirmed. Lord Alvanley, *C. J.*, said, p. 392:

"The policy includes capture and detention of princes, and any loss which necessarily arises from such acts is a loss within the policy. But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. If they could, the same principle would have applied in case information had been received at Falmouth that the ship could not safely proceed to Naples. * * *

"But the doctrine thus laid down [dealing with the ascertainment of a total loss] is only applicable to cases in which the loss is occasioned by a peril insured against; which as it appears to me, must be a peril acting upon the subject insured immediately and not circuitously, as in the present case. * * * I think the detention of the cargo on board the ship at a neutral port in consequence of the danger of entering the port of destination cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against. * * * P. 393. The plaintiff therefore cannot recover, unless the article be totally lost by a peril within the policy; and such peril must, as I think, act directly and not collaterally upon the thing insured. * * *

"Here without entering into the question how far the cargo was totally lost, the claim made by the assured arises from the ship not proceeding to that port to which she was destined. Had she proceeded to Naples the loss insured against might have arisen. If we were to decide that the sale at Port Mahon was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum, the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state and by giving notice of abandonment to throw a loss upon the underwriters to which they are not liable by the terms of the policy."

A similar case was *Forster* v. *Christie*, 1809, 11 East, 205. That was an action on a policy of insurance on goods on board the ship *Wolga*, on a voyage from Hull to St. Petersburg. Plaintiff claimed a total loss of the goods on the voyage by the perils of enemies and by arrest, restraint and detention of kings, princes and people.

The vessel sailed on October 10th, 1807, with convoy and was at anchor off Drago on October 20th, when she was boarded by a boat's crew from a British warship, with orders to put herself under the protection of the king's ships at Copenhagen. The boat's crew remained on board to enforce obedience to orders. The *Wolga* accordingly returned to Copenhagen, where she remained until October 31st, when she went to Helsingborg for convoy, and remained there waiting for convoy until November 7th. She then sailed under convoy of a British sloop of war into the Baltic until the 16th of November, when the commander of the convoy informed the master of the *Wolga* that the Russian Government had laid an embargo on all ships in Russian ports. The *Wolga* was accordingly ordered to stay with the sloop of war until they reached Copenhagen. There the *Wolga* was ordered by the British officers to proceed to Helsingborg and afterwards the master returned to England in convoy of a British bark, arriving on December 11th, 1807.

The embargo was in fact laid by Russia on November 15th, 1807, and war was declared and hostilities commenced between Russia and Great Britain on December 18th, 1807. If the *Wolga* had not been detained by the British officers, she would have arrived according to the usual course at St. Petersburg and delivered her cargo previously to the embargo. A verdict for the plaintiff was set aside, Lord Ellenborough saying, p. 209:

"This is no more than a detention by the convoy for a certain period, till by the laying of a hostile embargo in the destined port, the further prosecution of the adventure became impractica-

ble, and the voyage was lost, which according to *Hadkinson* v. *Robinson* is not a loss within the policy. There was indeed a detention by the king's ship, but there was no loss on that detention. Suppose there had been fair weather to a certain point of the voyage, and then bad weather and adverse winds, which had prevented the vessel from entering her port of destination till she had received advice of the embargo which obliged her to put back; could that have been declared upon as a loss by the perils of the sea? And yet that might as well be said to be the *causa remota* of the loss of the voyage, as the detention in this case: but that will not do; the risk insured against must be the effective cause of the loss, in order to charge the underwriters. But here there was the concurrence of another overbearing cause, namely, the hostile embargo in the destined port, which was the immediate cause of the ship's return and of the loss of the voyage; and the king's officer only prevented the ship from going into the enemy's port, and incurring a loss by capture; and such detention is not within the meaning of the clause against 'the arrest and detainment of kings', &c."

The next decision to be considered is the frequently quoted case of *Atkinson* v. *Ritchie*, 1809, 10 East, 530. That was an action by a charterer against the shipowner for breach of a charter-party by which the shipowner had agreed to proceed to St. Petersburg and there load a cargo of hemp and proceed to Woolwich or London. The ship sailed from Deptford on August 24th, and arrived at Cronstadt in the Port of St. Petersburg on September 16th, where she took on part of her cargo, until the 25th. On that day there was a general rumor of an embargo being

intended to be laid by the Russian Government on all English vessels. There was every appearance that it would take place immediately; but it was not laid until six weeks later. Under instructions from the British Consul General, at St. Petersburg, British vessels were requested to put to sea as soon as possible. The ship accordingly sailed on the evening of September 25th, with about a half cargo of hemp. The action was for the recovery of damages sustained by the failure to take a full cargo. The defendant pleaded an exception of "Restraints of princes" as a defense. It was held that the defendant was liable to the plaintiff for damages in not completing the cargo. Lord Ellenborough, *C.J.*, said, p. 533:

"Their relative claims upon, and duties in respect of, each other are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance. The rule laid down in the case of *Paradine* v. *Jane,* Alleyn 27, has been often recognized in courts of law, as a sound one; i. e. that 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may; notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.' And this has been recognized in several cases, as in *Buller* v. *Dommitt,* 6 Term Rep., 650, and *The Company of Proprietors of the Brecknock and Abergavenny Canal Navigation* v. *Pritchard and others,* 6 Term Rep., 750.

"It has been contended that the exception contained in this contract, of 'restraint of princes and rulers during the voyage,' excuses the not taking on board a complete cargo in this case.

But, without considering whether this provision respecting restraint of princes, &c., be at all applicable by way of excuse for the non-performance of this part of the master's stipulated duty, viz., the taking on board a complete cargo; yet, at any rate, *the restraint meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was.*

"But, it has been further argued by the defendant's counsel, that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter; yet, that he is so, at any rate, on the ground of his paramount duty to the state; which required him to save the property and crew under his charge from impending peril of an instantly expected embargo: and, that, in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the state is materially involved.

"That no contract can properly be carried into effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law; are propositions which admit of no doubt. Neither can it be questioned, that, if from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his sovereign and the state of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty and obligation on the part of the subject.

"But *in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place; and that the danger to result to the public interests of his own country, from an observance of the contract, should be clear, immediate and certain.* In short, such a state of circumstances must be shown to exist, as that the contract is no longer capable of being performed by him without a criminal compromise of his public duty. Can any thing of this kind be said, with truth, to exist in the present case? No actual change in the political relations of Great Britain and Russia had then taken place. The danger to result from remaining at Cronstadt was neither immediate or certain: in point of fact it attached only at the distance of many weeks afterwards. And no one can venture to suggest even in argument, that the loading in question might not have been completed without any criminal compromise of public duty. Indeed to allow a man to withdraw himself from the performance of a distinct positive contract, upon the ground of some speculative inconvenience suggested as likely to result from such performance to the general interests of the state, would afford great encouragement to disingenuous subtleties and refinements upon subjects of this kind, and would render all reliance upon the solemn stipulations of parties in commercial matters precarious and insecure; and which encouragement this Court would most reluctantly lend its assistance to administer. For the reasons already given, such an argument has no foundation to rest upon in the present case. Therefore, neither upon this ground, any more than upon the others already considered, is the plaintiff precluded from a right to recover."

In *Brunner* v. *Webster*, 1900, 5 Com. Cas., 167, there was a suit for non-delivery of goods in accordance with bills of lading which contained an exception "arrest and restraint of princes, rulers and people." In May, 1889, a cargo of rice was shipped at Rangoon on the defendants' steamship *Maling* under bills of lading for carriage to Galatz. The vessel proceeded to intermediate ports of discharge and on June 19th was at Beyrout. At that port the defendant was informed by the Director General in charge of the Sanitary Department of Roumania that the steamer was prohibited from discharging the rice at Galatz owing to precautions against plague in consequence of the steamer having stopped at Egypt. The British Consul at Galatz confirmed this opinion.

The vessel accordingly proceeded to London, claiming freight from Beyrout to London. In fact the Roumanian official, a few days after the vessel had started for London, issued an order permitting the *Maling* to discharge her cargo at Galatz. The court found that the Roumanian sanitary official was acting under a misapprehension in delivering his opinion. Kennedy, *J.*, said, p. 173:

"The question which I have to decide is whether the communication to the defendants of Dr. Obregea's opinion, confirmed as it was by the Consul, was a sufficient justification for the defendants' refusal to carry out their contract on the ground that they were entitled to treat the expression of that opinion as a 'restraint' within the meaning of the exceptions in the bill of lading. * * * In fact, at the date at which, if the vessel had gone to Galatz, she could have arrived there, no restraint on the

delivery of her cargo existed. The defendants, in taking the course they did without further delay for inquiry, took upon themselves the risk that their apprehension might turn out to be unfounded, as in fact it would have done, and, in my opinon, they must be held to be liable to the plaintiffs."

P. 174: "But generally speaking, *in order to justify a shipowner in putting an end to the contract voyage, there must be proof of more than a reasonable apprehension of restraint. The shipowner must prove the existence of such a state of facts as justifies him in saying that a restraint actually exists.* * * * In order to justify their course of action and to bring the case within the exceptions in the bill of lading they must, I think, show that at the time when the ship would have arrived at Galatz the position would have been such that the cargo would have been prohibited. The defendants are unable to show this, and therefore they have no excuse for the non-fulfilment of the contract."

This case is a complete answer to the contention of the claimant here that a reasonable apprehension that delivery of the cargo would be prevented at destination is sufficient to constitute an arrest and restraint of princes and would entitle the shipowner to treat his contract as impossible of performance.

The next case in point of time is *Nickels* v. *London & Provincial Marine and General Insurance Co., Ltd.*, 1900, 6 Com. Cases, 15. This was a claim for loss under a policy of marine insurance on rice from Liverpool to all or any part of call and/or discharge in Cuba, with liberty to call at Canary Islands. The risks insured were of capture, seizure, and detention, and the conse-

quences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war.

The rice, the subject matter of the insurance, was shipped on the Spanish steamship *Serra* for carriage from Liverpool to Cuba under a bill of lading of which the following were material terms:

"In case of war, blockade * * * or other cause which may prevent the vessel entering the port to which it is bound, or that as a consequence of such or similar events the captain shall not consider it prudent to enter * * * the goods shall be delivered to the consignee, or failing same, deposited at the nearest port which will admit them and which the captain may deem convenient * * * The delivery effected by the captain at the nearest port that may receive the goods shall be considered as final delivery, the whole of the freight being considered earned."

The vessel sailed in April, 1898, and on calling at Las Palmas, the master learned that hostilities had broken out between Spain and the United States, and that Havana was blockaded. He considered his most prudent course would be to take the vessel back to Liverpool, and he did so. The rice was landed at Liverpool, freight paid, some of the rice sold, and some warehoused. The plaintiffs claimed to recover, under the policy, the freight and warehouse charges. Mathew, *J.*, said, p. 17:

"My judgment in this case must be for the defendants. The loss which the plaintiffs seek to recover is not, in my opinion, a loss within the language of the policy sued upon. The sub-

ject-matter of the insurance was rice on a voyage from Liverpool to Cuba. * * *

"There was not in this case a capture or seizure, or any attempt thereat, for the vessel did not encounter any direct hostilities, but the plaintiffs seek to fix the defendants with a loss on the ground that, in the circumstances, the loss was due to the 'consequences' of hostilities. What happened was this. A Spanish vessel, having on board the goods which were the subject-matter of the insurance, sailed from Liverpool for Cuba. The Captain put into Las Palmas, as he was entitled to do. By that time war had broken out between Spain and the United States. Now, by the terms of the bill of lading the captain was at liberty in these circumstances to take his goods back to Liverpool and to claim payment of freight there. He went back to Liverpool and claimed freight from the plaintiffs, which they paid; they also incurred certain expenses in connection with warehousing the goods. It is said that the freight was paid at Liverpool, and the expenses were incurred, in consequence of hostilities. I am clearly of opinion that that was not so. The freight became payable at Liverpool in fulfilment of the terms of the bill of lading, and, similarly, the expenses were incurred through the proper exercise of a discretion conferred upon the captain by the bill of lading. The plaintiffs are, in effect, seeking to treat the policy as if it were a policy insuring them against loss through fear of capture and seizure. That is not the language of the policy, and, in my opinion, the plaintiffs' case fails. *Judgment for the defendants.*"

This case illustrates very clearly the difference between the obligation of the shipowner, where a

discretion is given to the master by the bill of lading to vary his voyage according to the dictates of prudence, and a case where the bill of lading does not give to the master any such liberty.

Where the liberty to vary is not given, the shipowner is unable to excuse his non-delivery. He could not show that the failure to deliver was due to the peril of capture that may have been excepted in his bill of lading. He would be in the same position in which the shipper was placed with respect to his insurer in the *Nickels* case where the shipper was unable to show that the loss had occurred by reason of capture covered by the policy. In fact, the loss there was caused by fear of capture, but the capture was not imminent, nor certain, nor remediless. Therefore the loss was construed as due to a mere fear that capture or seizure might take place. That was not sufficient.

Three important cases remain to be considered. The first is *Kacianoff* v. *China Traders Insurance Co.* [1914], 3 K. B., 1121. This was an action on a policy of insurance against the risks of capture, seizure and detention and the consequences thereof or any attempt thereat and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

The policy covered a cargo on steamers from San Francisco to Vladivostok. The plaintiffs had arranged for 3 shipments, one to Vladivostok, a second to Port Arthur and a third to Vladivostok via Nagasaki. The third shipment is the only one concerned in the case.

The vessels carrying the first two shipments were captured by the Japanese during the war

between Russia and Japan. Thereafter, while the third steamer was in the port of San Francisco with some of the cargo on board, it was known that the Japanese fleet was in the Pacific and was stopping and capturing vessels. The underwriters telegraphed to the plaintiffs, who were Russian subjects residing in Russia, that if the cargo were sent to Vladivostok via Nagasaki, they would claim that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere. Ultimately notice of abandonment was given to the underwriters who refused to accept it. The cargo was then discharged at San Francisco for sale and delivery at Shanghai.

The only question was whether, in the circumstances, there had been a constructive total loss of the cargo within the terms of the policy against war risks. It was held that there had not been. In the Court of Appeals, Lord Reading, *C. J.*, said, p. 1124:

"It is a policy against total loss based upon the exception clause: substantially it is a clause known as the f. c. s. clause and in this case all that it is necessary to say is that the insurance is against loss arising from the peril of capture * * *

P. 1125. "The claim is made against the defendants upon the policy of insurance and the question is: Has the peril insured against operated to cause that loss? In other words: What is the proximate cause of the loss which actually happened? In order to answer that one must as-

certain the facts with precision. The plaintiffs anticipated—and had apparently every reasonable ground for anticipating—that, if this vessel set out on that voyage, she would be captured by the Japanese and her cargo would be condemned and would be lost. It is true that the cargo was to be carried by a British ship, but in the circumstances—particularly having regard to what had happened with reference to the other two vessels which had been seized—the fear was entertained that the cargo would be condemned. It is said that not only was there a fear—that, it is admitted, would not be sufficient—but that it was reasonably certain that if this vessel did get to Nagasaki, and if she did transship that cargo of 4000 barrels of mess beef at Nagasaki for Vladivostok, the cargo would be lost; that was as certain as a thing could possibly be that was to happen in the future. I will assume, for the purpose of this case, as I think Pickford, J., intended to find, that it was reasonably certain, and not that there was some apprehension, that this cargo would be seized, condemned, and therefore lost. * * *

P. 1127. "And the real question which we have to answer in this Court is: this vessel never having set out to sea with this cargo, can it be said that the loss was occasioned by the peril insured against, that is, capture? In my opinion the question has only to be stated to be answered quite clearly in the negative. I entertain no doubt about this case. It seems to me that the peril insured against had never begun to operate. The fact of the vessel remaining in port and discharging the cargo there and then was preventing the peril from operating; it was making it impossible that the peril should operate. It would have been a totally different state of things if the vessel had left and then, outside, had been met

and threatened by a Japanese vessel, or if, approaching Nagasaki, she had been in some such danger. *No doubt there may be circumstances in which judges may differ as to when the particular peril did begin to operate, but there must be the beginning before the judge can exercise his judgment upon it.* In my judgment it is that which fails the plaintiffs in this case. * * *

P. 1129. "The case which is more in point is that of *Hadkinson* v. *Robinson*, 3 Bos. & P. 388, in which the Court came to the conclusion that the doctrine of constructive total loss is only applicable to those cases in which it can be proved that the loss is occasioned by one of the perils insured against. In the words of Lord Alvanley, *C. J.*: 'It must be a peril acting upon the subject insured immediately, and not circuitously, as in the present case.' Following the principle laid down by these decisions, I put this question: Was this loss occasioned by a risk within the policy, that is, was it a loss occasioned by capture? The answer is: Certainly not. *The vessel never was in risk of capture, because she determined not to undergo the risk*, the cargo never underwent the risk, because it was determined to discharge the cargo so as to avoid the risk. Therefore, never having come under the risk and the risk never having begun to operate, no claim can be made on this policy. In my judgment this appeal fails and must be dismissed."

Lush, *J.*, said, p. 1130:

"It seems to me on these facts impossible to say that the ship ever was in peril of capture. *What was done in discharging the cargo was really done to prevent the ship ever coming into the peril; it was not done to arrest the consequences of any peril in which the ship actually*

was. That being so, it seems to me quite impossible to say that the one was the consequence of the other."

Next is the late case of *Becker* v. *London Assurance Corporation*, 1915, 3 K. B., 410; affirmed, 1916, 2 K. B., 156.

The case was an action on a policy of insurance by British merchants against a British insurance company on a part cargo of jute for carriage from Calcutta to Hamburg, on the German steamship *Kattenturm.* The perils insured against included, men-of-war * * * enemies * * * takings at sea, arrest, restraints and detainments of kings, princes and people of what nation, condition or quality soever."

On August 4, 1914, while the goods were at sea, war broke out between Great Britain and Germany. On August 6th, the master, who had notice of the existence of the war, put into the neutral port of Messina in order to avoid the risk of capture by British or French cruisers then in the Mediterranean and with the intention of abandoning the further prosecution of the voyage until after termination of the war.

At the time when the ship was put into Messina, she had not been chased by a hostile cruiser nor had she even sighted one, but, as appeared from a letter from the British Admiralty, written after action brought, she would in their opinion have been in peril of capture by British or Allied warships when outside neutral territorial waters.

In September the plaintiffs gave to the defendants notice of abandonment and claimed that the goods were a constructive total loss.

The notice was repeated in December but the underwriters declined to accept abandonment. The Court held that the goods were not lost by a peril insured against. Bailhache, *J.*, said, p. 414:

"I have to consider what the state of affairs between the parties was at the beginning of September. The master in putting into Messina did the most prudent thing that he could do. His ship was a German ship; the French and English fleets were watching the seas; and he rightly felt that if he proceeded on his voyage the ship would be in grievous danger of capture. A letter from the Admiralty has been put in, and is to be treated by me as evidence, in which the writer says 'I am commanded to inform you that any German steamer proceeding on or after the 5th of August last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral territorial waters.' It is abundantly clear that the voyage from Messina to Hamburg could not in fact be continued, and I have no doubt that the master had no thought of attempting to continue it until after the termination of the war. How long the war would continue no one knew, but it was certain to last for so long and indefinite a period that the voyage was for all practical purposes abandoned when the master put into Messina.

"The policy was against the usual perils including men-of-war, enemies, takings at sea, and restraints of Princes, and Mr. Aspinall has argued that the loss of the venture, which, as the law now stands, constitutes a constructive total loss of the goods, was due to one of the perils insured against. He particularly relied on the words "men-of-war." What I have to consider

is whether the goods were lost by any of the perils mentioned in the policy, and in particular whether they were lost owing to men-of-war. The position was that when the master arrived at Messina he would have been in serious danger of capture if he had prosecuted his voyage and he put into that port because he was afraid of that event happening. Does that bring him within the words of the policy?

"Whether the avoidance of a peril, or an attempt to avoid a peril, is the same thing as a loss by the peril depends very much on what the nature of the peril is, and it seems to me quite clear upon the cases that an attempt to avoid capture is not the same as a loss by capture. I do not think it is absolutely necessary that there should be a *de facto* capture; I think that appears from *Butler* v. *Wildman* (1), the case of the Spanish dollars. On the other hand it is quite clear that the avoidance of a peril under most circumstances is not the same as loss by the peril itself. That appears from a number of cases: *Hadkinson* v. *Robinson* (2), *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (3), and *Kacianoff* v. *China Traders Insurance Co.* (4). That being the state of the authorities, and bearing in mind that on the one hand actual capture is not necessary, and on the other that (to use an expression used in the *Kacianoff Case* [4]), the peril must have begun to operate or (to borrow another expression from *Hadkinson* v. *Robinson* [2]), that the peril must operate directly and not circuitously, what one has to consider is what is the true view to be taken upon the facts in this case? It is obviously a question of degree, and that being so, the dividing line between

(1) [1820] 3B. & Ald. 398.
(2) 3 Bos. & P. 388.
(3) 6 Com. Cas. 15.
(4) [1914] 3 K. B. 1121

one case and another must often appear very thin and subtle.

"It appears from the *Kacianoff Case* (4) that if the *Kattenturm* had been chased into Messina the peril of capture would have begun to operate, and I think in that case it might be said that the abandonment of the voyage, and the constructive total loss of the goods by the destruction of the venture, was caused by a peril within the policy. If one looks at *Butler* v. *Wildman* (1) precisely the same thing happened there, only in an accentuated degree. There not only was the ship chased by a hostile man-of-war, but the chase was so hot that the master of the ship preferred to throw the valuable cargo, the Spanish dollars, into the sea rather than that they should fall into the hands of the enemy. Though the dollars were not actually captured, the Court held that there was a loss by capture. In the present case there was no chasing by a hostile man-of-war, *nor indeed was any such man-of-war sighted* by the *Kattenturm; nor was she driven into Messina by the intelligence of a particular man-of-war being in the neighbourhood.* The master went into that port because he feared, and rightly feared, that if he prosecuted his voyage the ship would be captured. Those being the facts, on which side of the line does the case fall? Had the peril, the peril of 'men-of-war', begun to operate, or was this a case in which the master had gone into a port to avoid the commencement of the operation of that peril? That is a point about which different people will entertain different views.

"My own view is that the master went into Messina *to avoid the commencement of the peril,* and that *at the time he went in it had not begun to operate.* It may very well be that the assured would have desired to insure himself against that

very event, for the goods were as much lost to him as they would have been if the ship had been captured. But I have to construe the words in this policy and to say whether the risks which are mentioned in it are risks which in fact caused the loss. I think they are not, and that the destruction of the venture was not caused by any risk insured against. In the case of *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1), in which my judgment was affirmed by the majority of the Court of Appeal, I discussed this very point, and the view which I there expressed is that which I still entertain. I said: 'One last point remains: Was the restraint of princes the proximate cause of the loss? The defendants say No, and refer me to a line of cases of which *Hadkinson* v. *Robinson* (2) is an early example, and *Kacianoff* v. *China Traders Insurance Co.* (3) is, I think, the latest. The plaintiffs, on the other hand, refer me to *Miller* v. *Law Accident Insurance Co.* (4). It is, I think, correct to say that the *Hadkinson* v. *Robinson* (2) line of cases proceeds upon the principle that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided. In deciding within which set of authorities a given case falls it must always be borne in mind that much depends upon the character and description of the particular peril which has to be alleged and relied upon as the cause of the loss.' Applying that test to the facts of this case, I have come to the conclusion that it is the opposite of

(1) [1915] 2 K. B. 781. (2) 3 Bos. & P. 388.
(3) [1914] 3 K. B. 1121. (4) [1903] 1 K. B. 712.

Sanday's Case (1), and that these goods were not lost by a peril insured against."

In the Court of Appeal, 1916, 2 K. B. 156, Swinfen Eady said, p. 163:

"It is well established in the English law of marine insurance that in many cases the loss of an adventure by a resolution not to incur a particular peril is not the same, as it does not occasion a loss by the peril itself. * * * It was contended that if the *Kattenturm* had attempted to proceed through the Straits of Gibraltar to Hamburg there was a practical certainty that she would have been captured, and that as the subject matter insured was reasonably abandoned on account of its actual total loss appearing to be unavoidable, there was a constructive total loss. * * * "

Page 164: "It is not difficult to draw a line between vessels which determine not to run a particular risk and vessels which persevere in their voyage and enter a zone in which they are in peril, persisting until it becomes clear that in the existing circumstances they cannot complete the voyage and escape from the peril, and that the only course is either to desist and abandon the voyage, or inevitably incur a loss by the particular peril. * * * In my opinion the *Kattenturm* was never in peril of capture by man-of-war."

Pickford, *L.J.*, and Bankes, *L.J.*, delivered concurring opinions. Bankes, *L.J.*, said, p. 173:

"It was argued before us that modern conditions required a different view to be taken of what constitutes being in actual peril from what

(1) [1915] 2 K. B. 781.

was taken in former times under quite different conditions. I do not agree that this argument goes the length contended for. Conditions have certainly entirely altered, but there must still always be a dividing line between the case of a vessel which is in real peril of capture and the case of a vessel whose master has taken sufficiently early and sufficiently complete steps to keep altogether out of harm's way. In my opinion the earlier authorities on this point are still good law."

Finally there is the important case of *Mitsui* v. *Watts, Watts & Co.*, decided by the Kings Bench, Bailhache, *J.*, and by the Court of Appeal, 1916, 2 K. B. 826 and affirmed by the House of Lords March 16, 1917. In that case the defendants, shipowners, by charter party dated June 5, 1914, agreed with the plaintiffs to provide a steamer to proceed to Marioupol in the Sea of Azov, and there load a cargo of sulphate of ammonia and carry it to Japan. There is an exception in the bill of lading of "arrest and restraints of princes, rulers and people."

On September 1 the defendants declined to name a steamer to perform the charter, giving as a reason that the British Government had prohibited steamers from going to the Black sea to load. The Government had not in fact issued such prohibition. If the defendants had sent a steamer in time to commence loading at Marioupol by noon of September 20, the cancelling date, she could not have arrived at the Dardanelles on her voyage to Japan before the Dardanelles was closed by the Turkish Government on September 26 or 27, 1914.

It was held that the defendant's had committed

a breach of contract in not sending a steamer to load as there was not at the time an existing restraint of princes nor did a reasonable apprehension which turned out to be well founded that the Dardanelles would be closed before the steamer could have passed through on her voyage to Japan justify the defendants under the exception of restraint of princes. Bailhache, *J.*, said, p. 831:

"No authority was cited to me in support of the defendant's proposition that a breach of contract is excused by reasonable anticipation of the happening of an event which, if it happens, will excuse the performance of the contract, and in my opinion such a proposition will not bear examination."

In the Court of Appeals Swinfen Eady, *L.J.*, said, p. 839:

"Except for the increased danger, there was no reason why the steamer should not have proceeded there to load. The Dardanelles was open at this time, and having regard to the terms of the charter the defendants were bound to send a steamer to load this cargo. It was urged that at a later date the Dardanelles was closed, and that if a steamer had been sent to Marioupol not later than the cancelling date and had then loaded the cargo, having regard to the subsequent closing of the Dardanelles, the cargo could not have been carried to Japan. There was, however, nothing at this date to excuse the defendants from their obligation to send a steamer to load."

P. 840: "In the present case at the date of the alleged breach there was nothing to prevent the vessel from going to Marioupol to load pursuant to the terms of the charter party."

Phillimore, *L.J.*, concurring, said, p. 846:

"But in this case there was at the moment no reason to suppose that the adventure might not be carried through, though at greater cost because there would be an obvious prudence in insuring against war risks. It was therefore the duty of both parties to perform the contract so long as they could, up to the point when its performance would be excused. There was no reason why the ship should not have sailed for Marioupol, and there was a breach of contract by the ship owners in refusing to declare and send the ship."

Bankes, *L.J.*, concurring, said, p. 850:

"In all the cases which have been relied upon by the defendants I think it will be found that there was, at the time when the repudiation of the contract occurred, an actual existing restraint of princes. In the present case the most that can be said is that there was reasonable apprehension that before the time arrived to complete the performance of the contract a restraint of princes would arise which would prevent its complete performance. In my opinion that is no answer to the allegation that there was a breach of contract."

In the House of Lords the Lord Chancellor said, in the law report in the Times of March 17th:

"The contention of the appellants that they could justify the failure to provide a steamship on the ground of the exception of restraint of princes was not made good. There was not in fact any restraint of princes to prevent the passage of the steamship through the Dardanelles and to Marioupol until the closing of the Dardanelles on the evening of September 26. There

was a reasonable apprehension that the Dardanelles might be closed, but such an apprehension did not constitute a restraint of princes. To bring the case within the exception there must be an actual restraint in existence, and in the present case there was nothing to prevent the steamship from passing the Dardanelles and arriving at the port of loading by the cancelling date (September 20)."

The present case is not nearly so favorable to the petitioner as was the Mitsui case for the defendant.

There was there a reasonable apprehension which proved to be well founded that a restraint of princes would be exerted before the contract could be completed. In this case, on the contrary, there was not any well founded apprehension that a restraint of princes would be exerted at any stage of the voyage, and in fact the vessel would have completed her voyage and discharged her cargo without incurring any risk whatever.

i. The foregoing authorities establish the following propositions:

Where an assured seeks to recover from his insurer for a loss claimed to have been caused by fear of an expected peril, *it must be shown* that the *danger was imminent, apparently remediless and morally certain. A contingent danger is not sufficient.* The danger must be certain against the very ship. *Craig* v. *United Insurance Co., supra,* p. 50.

The restraint must be present and existing. *Corp* v. *United Insurance Co., supra,* p. 54.

An apprehension, founded on misrepresentation, of a restraint or detention that does not in

fact exist, does not justify the abandonment of a voyage. False intelligence received during a voyage does not justify a master in acting as if the intelligence were true. *King* v. *Delaware Insurance Co., supra,* p. 55.

The danger must be obvious and immediate in reference to the situation of the ship at the particular time and must be imminent and apply directly to the interruption of the voyage. *Oliver* v. *Maryland Insurance Co., supra,* p. 57.

The peril must be immediate and act directly and not circuitously. It is not sufficient that a voyage be abandoned for fear of the operation of the peril. *Smith* v. *Universal Insurance Co., supra,* p. 58.

A well grounded fear that a total loss will arise from one of the perils insured against if the voyage be pursued is not a peril within the policy and will not authorize an abandonment of the voyage. *Richardson* v. *Maine Insurance Co., supra,* p. 61.

If a master avoids the port of destination on learning that if he enters it there is danger that the vessel will be confiscated, the loss is not occasioned by a peril insured against. The peril must act immediately and not circuitously. *Hadkinson* v. *Robinson, supra,* p. 64.

A detention by order of the King's officer preventing a vessel from going into an enemy's port and thus incurring a loss by capture, is not a loss by arrest and restraint of princes. *Foster* v. *Christie, supra,* p. 66.

A restraint must be actual and operative and not merely expected and contingent. A shipowner is liable, if he breaks his contract through fear of an expected embargo. *Atkinson* v. *Ritchie, supra,* p. 68.

In order to justify a shipowner in putting an end to the contract voyage there must be more than a reasonable apprehension of restraint. The shipowner must show facts to justify him in saying that a restraint actually exists. *Brunner* v. *Webster, supra,* p. 71.

An abandonment by the master of the voyage through prudential considerations in fear of possible loss if he continues does not constitute a loss by capture, seizure and detention. *Nickels* v. *London & Provincial Marine & General Insurance Co., supra,* p. 73.

An abandonment of a voyage to avoid certain capture if vessel proceeds, is not a loss by peril insured against. The peril has not begun to operate. The abandonment prevents the ship coming into the peril and the loss is not in consequence of an insured peril. *Kacianoff* v. *China Traders Insurance Co., supra,* p. 77.

An attempt to avoid an existing and certain peril does not constitute a loss from the peril. The peril is not imminent. *Becker* v. *London Assurance Corporation, supra,* p. 80.

A failure to send a vessel on a voyage as contracted for because of a reasonable apprehension, which turned out to be well founded, that a restraint of princes would be exerted against the steamer on her return trip, does not constitute a restraint of princes so as to justify refusing to send the steamer to load. *Mitsui* v. *Watts, Watts & Co.,* 1916, 2 K. B. 826, affirmed by the House of Lords, March 16, 1917, *supra,* p. 84.

III. Judged by these principles the petitioner's defence must wholly fail.

a. Existing conditions did not justify the order.

The message was a false statement of a condition of affairs that did not exist, and it contained a positive direction that the master should act in an indicated way.

The statement as of fact in this message was false, not by accident but by the intention of the owners.

It is admitted in the answer to the libel of Rantoul that war had not been declared between Germany and England, France and Russia on July 31st. Fol. 193.

It was stipulated at the trial that all matters stated in any stipulation and all evidence, interrogatories, answers and proceedings should apply so far as applicable, to all the cases. Fol. 1260.

In fact the first declaration of war between any two of the countries above mentioned took place on August 1st, 7:10 P. M. when Germany declared war on Russia through the delivery by the German Ambassador at St. Petersburg of a note to the Russian Foreign Minister. *Stipulation*, 793.

War was declared by Germany on France on August 3rd at 6:45 P. M., through the delivery by the German Ambassador at Paris of a declaration of war to the French Minister for Foreign Affairs. *Stipulation*, 836. France's counter declaration dated from the same hour. Fol. 867.

On August 4th, 1914, England declared war on Germany as of 11 P. M. on that day by formal notification to the German Government. *Stipulation* 874; *Answer to libel of Rantoul*, 194.

It is true that in the answer of the claimant it is stated, fol. 42, "While said steamship was

proceeding on her voyage a general war broke out in Europe in which Germany was involved"; and at fol. 45, "A state of war existed between Germany and France and Russia before the date on which she could have arrived in due course at Plymouth."

The evidence, however, does not support these allegations.

On August 1 the German Emperor telegraphed to the King of England that if France offered neutrality guaranteed by the British fleet, he would refrain from attacking France, and said, "I hope that France will not become nervous." Fol. 787.

On August 1st also the German Chancellor had advised the German Ambassador in London that although German troops had been mobilized on the French frontier, Germany guaranteed that until August 3rd, at 7 P. M., the French frontier would not be crossed if Germany had received by that time an acceptance by England of a German proposal relative to the neutrality of France. *Stipulation*, 774, 775.

While, viewed in the light of after events, the German guarantee might be considered of questionable validity, yet it may be taken as conclusive proof that Germany would not consider war to be existing between France and Germany before the indicated time.

Moreover, on August 2, the German Foreign Secretary, in response to the protest of the French Ambassador at Berlin against acts of aggression by German soldiers on the French frontier, said that he did not have any knowledge of the facts, and that "it was difficult for events of this kind not to take place when two

armies filled with the feelings that animated our troops, found themselves face to face on each side of the frontier." Fol. 821.

On August 3 an official communication in Berlin announced that the French reply to the German note [of July 31, asking if France would remain neutral in a Russo-German war], was of an unsatisfactory character and that the "outbreak of war between Germany and France *must be awaited* any moment." Fol. 847.

During the morning of August 3 the German Foreign Secretary informed the French Ambassador, "The Government has not yet come to a decision." Fol. 830. Before that time the *Cecilie* would have completed the delivery of the gold and sailed. See *infra*, pp. 110-121.

Herr von Schoen delivered the German declaration of war to the French Foreign Minister at Paris at 6:45 P. M., on August 3 and asked for his passports just 15 minutes before the expiration of the time limit mentioned in the communication of August 1 from the German Chancellor to the German Ambassador at London. Fol. 775.

These official communications are altogether incompatible with any understanding by Germany of existing war with France previously to August 3, 1915, at 6.45 P. M.

So also the fact that the master continued on his voyage until July 31st although he kept acquainted with the march of events is conclusive proof that those events did not seem to him sufficient to justify him in abandoning the voyage which the steamship had contracted to make.

The District Judge incorporated in his opinion copies of certain portions of the Ocean Ga-

zette of July 29th and July 31st from copies of that newspaper printed on the steamship on those dates. These extracts purported to give news items of the day and included the declaration of war by Austria on Servia. They did not add anything of real importance to the situation. They did not indicate when, if at all, war would break out involving other powers, nor if it did, what powers would be involved.

The information published in the Ocean Gazette did not cause Captain Polack to abandon his voyage, since he has explicitly stated that he could not act on the information that he received previously to the cable from his directors, fol. 1082, and that he was going along on his voyage until he should hear from them.

Moreover, other circumstances not referred to by the District Judge but included in the stipulation of facts made the outbreak of war involving Germany and other powers seem less likely.

Thus, on July 29, when Russia informed Austria that a somewhat extended mobilization had been ordered, it was added that this was done "as a precautionary measure only; that the troops were not destined to attack Austria; but would be held armed and ready in case Russian interests in the Balkans should be imperiled; Russian Minister spoke of the harmlessness of this measure." Fols. 726-727. On July 29, in a conversation between Sir Edward Grey and the German Ambassador, "the German Ambassador said emphatically that some means must be found for preserving the peace of Europe." Fol. 728. On the same date, England requested Germany to suggest any form of procedure under which the idea of mediation between Austria and Russia, already accepted

by the German Government in principle, could be applied. Fol. 730. On that date also, France notified Germany that she was sincerely desirous of peace. Fol. 730. On the same date, Russia, after ordering mobilization in the military conscriptions of Odessa, Kiev, Moscow and Kazan, "notified the German Government that these military districts have been mobilized along the Austrian and Hungarian frontier exclusively, and stated that this should not be taken as an aggressive measure, even against Austria, the explanation being the mobilization of the greater part of the Austro-Hungarian Army. Russia also informed Germany that the military measures taken by Russia were not directed against Germany." Fols. 732, 733.

On the same date, the 29th, the Czar telegraphed the Kaiser, saying: "It would be right to give over the Austro-Servian problem to the Hague Conference." Fol. 735.

On July 30, Russia notified Germany that she would demobilize if Austria would give an assurance that she would respect the sovereignty of Servia, and submit certain of the demands of the Austrian note, which Servia had not accepted, to an international discussion. Fol. 739. On the same date, Russia advised Germany that, if Austria would eliminate from her ultimatum, clauses which affected the sovereignty of Servia, Russia would undertake to stop all military measures; and the German Ambassador promised to urge this proposal on his Government. Fols. 740, 741.

On July 30, the Austrian Secretary of State informed the Russian Ambassador that, with a view to settling the Austro-Servian dispute, it was agreed that *pourparlers* should be resumed at St.

Petersburg, the Austrian Ambassador being authorized to discuss what settlement would be compatible with the dignity and prestige for which both empires had equal concern. Fol. 742.

On July 31 Austria-Hungary announced at St. Petersburg her willingness to discuss with Russia her differences with Servia. The Austrian Government, at the same time, communicated to the French Government her willingness to discuss even the basis of the Austro-Servian question at London with the other Powers. Fol. 747. On the same date Russia offered to the Powers an agreement that, if Austria would check the advance of her troops on Servian territory, and allow the Great Powers to look into the matter of dispute between her and Servia and decide what satisfaction Servia could afford to the Austro-Hungarian Government without impairing her rights as a sovereign state, Russia would undertake to maintain her waiting attitude. Fols. 750, 751.

On the same date, July 31st, the Czar telegraphed the German Emperor assuring him that no intention whatever of aggressive character was conceived behind Russian military preparations, and that so long as conversation with Austria continued the Czar undertook that not a single man should be moved across the frontier. Fol. 752. The Czar also expressed himself ready to continue his conversation with the German Ambassador with a view to preserving peace; and the French Government stated that their wishes were markedly pacific, that they sincerely desired the preservation of peace, and did not quite despair even now of its being possible to avoid war. Fols. 759, 760, 761.

It is apparent from these circumstances that, so far from the situation being more desperate on July 31 than it had been previously to the sailing of the *Kronprinzessin,* it was really better, since Austria had agreed to discuss her ultimatum with Russia, the Czar had suggested the arbitration of the whole matter at the Hague, and had also notified the German Ambassador that not a man should cross the frontier so long as the Austro-Servian question was under discussion between the Powers.

Germany was the only power that seemed to be holding back. On the evening of July 31, she issued the decree of *Kriegszustandes,* of which the Directors claim that they had advance notice. It is stipulated, however, that "The foregoing decree had the effect of putting Germany on a war footing but did not amount to a declaration of war against or actual hostilities with any other nation." Fols. 754, 755. It must, therefore, be regarded as a purely internal measure which could not change the existing international situation until something further should be done by Germany to the other powers under or in pursuance of it. The directors do not claim that they were informed what would be done under or in pursuance of it if anything. It did not, therefore, justify them in expecting that war would break out before the completion of the voyage if at all, and manifestly it was no foundation for the message that they sent to the captain.

The whole subject of a change of conditions between July 27 and July 31 is probably wholly immaterial: first, because it does not appear that the Directors were cognizant of the discus-

sions that were passing between the Powers, and presumably were ignorant of them, since they were not made public by any of the nations until after the war; and, secondly, because they have stated that the sole ground of their order to the master recalling the *Cecilie* to New York was their advance knowledge of the decree of *Kriegszustandes,* fols. 1399-1404, which it is expressly admitted between the parties "did not amount to a declaration of war against or actual hostilities with any other nation."

The directors admit that they gave the order to the *Cecilie* "in expectation of the breaking out of the war" precisely as they did to their entire fleet. Fol. 1408 and list p. 354. The order could not, therefore, have had relation to any assumed danger affecting this particular ship, as distinguished from the others, many of which were in port. It was obviously a mere prudential measure taken in view of possible future political risks.

The directors of the line have stated that the decree of Kriegszustandes, a state of war for the German Empire,

"*Alone can be designated as the decisive fact inducing us to recall the 'Cecilie.'*

"Consequently the explanation of all facts in detail requested, is rendered unnecessary, as to what induced us to send off our telegrams, as they are only of secondary importance.

"Consequently the considerations which induced us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable." Fols. 1404, 1405.

Thus it appears that when the recall of the steamer was ordered by the directors there was not, in fact, any danger, for war had not broken out. The danger that the Directors had in mind was contingent on the outbreak of war which they say they "considered as most probable." Fol. 1405.

This was nothing more than an apprehension that if war should break out in the uncertain future, the steamer, if she continued on her voyage, might then be subjected to a danger of capture. It was wholly problematical whether or not that danger ever would arise. A political possibility cannot be considered to be an arrest and restraint.

b. The Directors were not justified in speculating on the future and assuming that war would break out.

The House of Lords in *Janson* v. *Driefontein*, 1902, A. C., 484, 497, 498, stated in the most positive terms that it is not for private individuals to pronounce on the foreign relations of their country, nor to measure their own responsibilities arising out of civil contracts with foreigners by a standard of public policy which they set up for themselves. So long as the government of the state abstains from declaring or making war, there is peace with all attendant consequences for all the subjects of the state.

It was also held by the highest court in New York in *People* v. *McLeod*, 1841, 25 Wendell, 483, that the courts must presume a state of peace until the national power of the country declares the contrary. That case arose on a writ of *habeas corpus* to secure the release of McLeod

under indictment for the murder of Durfee. It was pleaded that the act complained of was a military act that was lawful in the state of war then claimed to be existing between Canada and the United States. Cowan, *J.*, said on this plea, p. 574:

"A state of peace and the continuance of treaties must be presumed by all courts of justice till the contrary be shown; and this is *presumptio juris et de jure*, until the national power of the country in which such courts sit, officially declares the contrary. A learned English writer on the law of nations makes this remark (1 Ward's Law of Nations, 294): 'Although I am aware that there is a great authority for the contrary opinion, yet it is upon the whole settled, that no private hostilities, however general, or however just, will constitute what is called a legitimate and public state of war. So far, indeed, has my Lord Coke carried this point, that he holds, if all the subjects of a king of England were to make war on another country in league with it, but without the assent of the king, there would still be no breach of the league between the two countries:' 1 Bl. Com., 267, S. P. Again, in *Blackburne* v. *Thompson*, 15 East, 81, 90, Lord Ellenborough, *Ch. J.*, delivering the opinion of the court of King's Bench, said: 'I agree with the master of the rolls, in the case of *The Pelican*, 1 Edw. Adm. R., Append. D., that it belongs to the government of the country to determine in what relation of peace or war any other country stands towards it; and that it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations. But when the crown has decided upon the relation of peace or war in which another country stands to this, there is an end of the question.' 3 Camp., 66, 67, S. C. and S. P.

"So far were the two governments of England and the United States from being in a state of war, when the *Caroline* was destroyed, that both were struggling to avoid such a turn of the excitement then prevailing on the frontier, as might furnish the least occasion for war. * * *

"In speaking of public war, I mean to include, all national wars, whether general or partial; whether publicly declared, or carried on by commissions, such as letters of marque, military orders, or any other authority emanating from the executive power of one country, and directed against the power of another; whether the directions relate to reprisals, the sieges of towns, *the capture or destruction of private or public ships*, or the persons or property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind, not having for its avowed object the exercise of some influence or control over the adverse nation as such. I deny that public war in this sense can be made out by affidavit, or by any other medium of proof than the denunciation of war by one or both of the two nations who are parties to it."

The German Directors could have found an illustration of this principle in the history of their own country. In 1867 Count Moltke said to a fellow member of the North German Parliament, Count Bethusy:

"I cannot but wish that the occasion given for a war with France were taken advantage of. Unhappily I regard this war as absolutely unavoidable within the next five years, and within this period the now indisputable superiority of our organization and weapons will be equaled by France. * * * The sooner, therefore, we come to blows the better."

These views were laid before Bismarck, who said he recognized the justice of Moltke's remarks, but could not assume responsibility for the course of action proposed. He said:

"The personal conviction of a ruler or statesman, however well founded, that war would eventually break out, could not justify its promotion. Unforeseen events might alter the situation and avert what seemed inevitable." *Essays, Speeches and Memoirs of Count Helmuth von Moltke*, translation, vol. 2, pp. 204, 205. *Bismarck, Memoirs*, translation, v. 2, p. 103.

Again in 1875, when it was urged that the first favorable opportunity of crushing France should be seized, Bismarck repeated that it was impossible to say that any war was inevitable. "No one," he said, "can look into the cards held by Providence." *Memoirs, Translation*, vol. 2, p. 103.

So in this case, although the German Directors may have thought it altogether probable that war would break out, they could not tell when, if at all, war would take place, nor if it did, what countries would be involved in it.

However acute and fraught with possibilities of war those conditions were, peace still existed. At least so long as peace continued the petitioner was bound to proceed with the performance of its contract under which it had undertaken to transport the respondent's gold from New York to Plymouth for a freight in advance of $9,268, fol. 30, which indeed the petitioner still retains. The petitioner did not include, as a condition of its contract, that if the political situation should become more acute in the opin-

ion of the Directors of the Line, they should be free to refuse to deliver the gold as they had contracted to do.

Judge Dodge referred to this circumstance at page 441, where he said:

"On July 31, 1914, when the owner abandoned the voyage, there was, no doubt, danger that an actual state of war would arise whose existence would make Plymouth and Cherbourg hostile ports as regarded the vessel. But this was not a danger arising after the voyage had begun, there was danger that just such a war would arise when the bills of lading were given, four days before, on July 27. That this very danger was then present to the minds of both parties to these contracts of affreightment is not and could not be disputed."

On the 27th of July, 1914, the respondent, knowing the existing political situation, might have delayed its shipment until July 29th and sent it forward on that day on the British steamer *Carmania*, sailing for Liverpool. Fol. 1257.

The fact that the respondent made the shipment on the *Kronprinzessin Cecilie* warrants the strongest inference that time of delivery was of great importance.

As Judge Dodge found, p. 441:

"It appears that the specie might at the time have been shipped on British or French vessels at New York for the above ports, as to which said ports would not have become hostile in event of war; and that it was shipped on this German vessel in order to take advantage of her greater speed."

In making this shipment on a German rather than a British steamer it cannot be said that the

libelant assumed any risk other than in accordance with the terms of the bill of lading.

It must be inferred that neither the libelant nor the claimant thought on July 27th when the contract of carriage was made that it would not be performed, but that both parties expected that the contract would be completely carried out unless in the happening of contingencies mentioned in the bill of lading that might prevent performance.

The Directors say that when they decided to go back on their contract, and sent the order of recall of the steamer to the master, they thought that the existing state of peace probably would soon be changed into an existing state of war. Fol. 1405. The proposition that such an apprehension should be construed to amount to an arrest and restraint of princes within the meaning of those words in a bill of lading, is without the slightest warrant in principle or authority.

A case cannot be found where any Court has excused a common carrier for failure to perform his contract where such failure was due to an apprehension that at some future time the performance of the contract would be attended with risk that an arrest and restraint of princes not presently existing might come into operation against the steamer.

There could be no basis for such an apprehension in advance of actual war other than a presumption that France or England would violate international law and usage by arresting a vessel previously to war.

c. There was no danger of French capture, since France considered she was in a state of peace.

It is of much greater materiality to this case to ascertain the point of view of France than of Germany, for there could not be any fear of an arrest and restraint of the steamer by the French authorities until France considered that she was at war with Germany.

Not only had the French Ambassador at Berlin on August 2 protested to the German Government against the acts of German soldiers, but the French Foreign Minister had challenged the accuracy of the allegations made to him on August 3 by the German Ambassador, as to actions by French aviators.

It is immaterial whether or not the German and the French soldiers committed the acts that were the subject of dispute by their respective governments. The German directors could not have been influenced by any rumors on the subject, if indeed they heard any, for they say that the decree of *Kriegzustandes* alone induced them to recall the *Cecilie*. Fol. 1404.

The time when France became at war with Germany is determined by the official notification from the French Government to the United States Ambassador on August 4, which after reciting various military outrages by Germany, and that Germany had declared war on France at 6.45 P. M., on August 3, said:

"In these circumstances the Government of the Republic find themselves obliged on their side to have recourse to arms. They have in consequence, the honor of informing by these presents, the Government of the United States that a state of war exists between France and Germany *dating from 6.45 P. M. on 3rd August*, 1914." Fols. 866, 867.

Thus it appears that both the French and the German Governments considered that they were not at war with each other until August 3 at 6.45 P. M. The respective Governments only could decide whether they were at peace or at war. As Lord Macnaghten said in *Janson* v. *Driefontein* [1902], A. C., 484, 497:

"In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace or war * * *. However critical may be the condition of affairs, however imminent war may be, if and so long as the government of the state abstains from declaring or making war, or accepting a hostile challenge, there is peace—peace with all attendant consequences—for all its subjects."

To the same effect: *People* v. *McLeod*, 25 Wend., 483.

d. It is not to be presumed, in the absence of all evidence, that either France or England would have committed the hostile act of attempting to arrest and detain this German vessel before a state of war between them and the German Empire existed.

Indeed we have positive proof that this would not have been done.

The Hamburg-American Line steamer *Slavonia* from Libreville, French Congo, was allowed to pass Dover on August 4th. The German steamer *Ophelia* cleared and sailed from London for Hamburg on August 4th without any interference by the French. Fol. 871.

Moreover, another *Kronprinzessin Cecilie*, a German steamer owned by the Hamburg-Ameri-

can Line, anchored in the port of Falmouth early in the morning of August 4th. Fol. 849. Not only was she free to leave on that day, but it was intimated to her by the port authorities that she should do so, as she was not justified in remaining within the port. The steamer did not leave and on August 5th was seized and subsequently was condemned as a prize. See the *Prinz Adalbert*, the *Kronprinzessin Cecilie*, 1916, 32 Times L. R., 378.

c. Nor could the petitioner justify an apprehension of *ante bellum* arrest and restraint of this particular ship by reason of the fact, proved over objection at the trial, that she was suitable for use as an auxiliary cruiser. Fols. 968-987. It is not shown that this circumstance was known to the English or to the French authorities. Only an expert examining the ship would have discovered it. Pp. 245, 246. Nor is knowledge of it imputable to the libelant, since the vessel had never been in any military or naval service, but on the contrary, had been held out to the public for years as an ordinary commercial vessel. Fols. 1069, 1156, 1158. If there was a secret suitability of the ship for auxiliary war service the claimant cannot rely on any possible risk arising from such fact as the basis of action prejudicial to the libelant's interest.

IV.—These conclusions are fully found by the Court of Appeals. Thus Judge Dodge said, at p. 439:

"There having been no actual arrest or restraint of the kind referred to, the owner's act in ordering the ship's return to New York is jus-

tifiable, if at all, only by proof that there was at the time ground for apprehending actual arrest or restraint unless she so returned, such as the law of carriage by sea recognizes as the equivalent of actual arrest or restraint. The question is whether or not the requisite proof has been made in this case.

"It may be taken for granted that when it has become plainly obvious that continuance of the voyage must necessarily involve arrest or restraint, and can have no other result, such departure from the voyage as is necessary to avoid the danger is not only permissible, but is required of the vessel. She must do what is needful for the purpose of avoiding any actual and presently imminent danger, instead of adhering to a course which can only carry her directly into it. But the evidence here relied on, as will appear, is far from showing the existence of any such situation. What is relied on is, at most, the desirability of keeping the ship out of reach of a future, contingent danger."

Judge Dodge then considers the contention of the owners that the phrase "arrest and restraint of princes" in a bill of lading is to be given a different rule of construction than in the case of a policy of insurance, and he concludes, at page 440, that there is no such distinction.

The owners urged in the Court below and apparently will urge here, that the carrier undertakes to exercise reasonable care to prevent a loss from an excepted peril, and so they conclude that "it would be an absurdity to hold that the per-"formance of a duty creates a liability for dam-"ages."

There is an almost Teutonic simplicity about this argument.

If the peril excepted in the bill of lading actually existed there might be a duty on the part of the carrier to exercise reasonable care and diligence to avoid the peril.

But there was not any peril.

Certainly it might be said that it would be an absurdity to hold that there was any duty on the part of the carrier to deviate from the voyage in order to escape a non-existent peril. Otherwise the general rule of law covering liability of a common carrier would have to be altered by the insertion of an exception of timidity.

Judge Dodge accordingly concluded, p. 440:

"That the arrest or restraint which will excuse failure to make the delivery undertaken by a contract of affreightment unqualified except as in these bills of lading must be an actual and operative restraint, and that no merely excepted and contingent restraint affords sufficient excuse, has been settled law at least since Atkinson *v.* Ritchie, 10 East., 530. * * *"

P. 443: "The evidence shows also that the order to turn this ship back to New York, instead of being a single order given with particular reference to this ship, or her cargo, or her relations thereto, was only one of many other like orders similarly transmitted during the same day to all steamships at sea belonging to the same owner, and then on voyages tending to bring them, if continued, within regions where, in case of actual war between Germany and the other countries named, their capture or detention might become possible. The owner's evident object was, not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such re-

gions of possible future danger. This may well have been the course most for the owner's advantage. But, under the contracts here sued on, it cannot justly be held that the circumstances proved entitled her owner to divert this steamship from the voyage undertaken as above, without incurring any liability to the owners of the specie for their loss thereby caused."

The conclusion of Judge Bingham was similar. He said, p. 449:

"No case has come under my observation where it has been held that there was a restraint of princes within the meaning of the clause, in the absence of an act of a sovereign power or state rendering the venture unlawful; or, if the sovereign act was that of a foreign power or state, so that the venture was lawful, unless the circumstances disclosed physical restraint due to that sovereign act of a direct and operative nature. * * *"

P. 450: "Here there was no declaration of war or authorized acts of war involving the nations in question at the time the ship abandoned her contract. The venture was legal, not illegal, and her return to America was not due to any restraint of a sovereign act, legal or physical; but was to avoid a supposed future peril to which it might become subjected."

V. Reference to events subsequent to July 31, does not assist the petitioner.

a. The liability of the petitioner is to be determined by the posture of affairs that existed on July 31 when the *Cecilie* was recalled to New York. The language of Lord Gorell in *The Savona* [1900], Prob., 252, at p. 259, is apposite:

"I do not think this case can be decided by what happened afterward, except as to a test of what was the true state of things at the time when the question of breach has to be considered."

Nevertheless, as the claimant, in its brief in the court below, referred to conditions subsequent to that time as affording a sort of *ex post facto* justification of the action of its directors taken on July 31, a short reply to these suggestions may not be inappropriate.

b. The claimant has been unable to produce any proof that the vessel could not in fact have completed the voyages to Plymouth and Cherbourg, and Bremerhaven, without the intervention of any expected peril.

On the contrary there is no reason on this record to doubt that if the steamer had proceeded on her voyage, she would have reached Plymouth, discharged her cargo, and left in safety.

It is stipulated that, if not stopped by excepted perils, she would, in all reasonable probability, have reached Plymouth between 11 P. M. of August 2 and 1 A. M. of August 3. Fols. 661, 662. The facts clearly indicate that she would have been there by 11 P. M. of August 2.

At the time of turning round, 10 P. M. ship's time July 31 or 11.45 Greenwich time, fols. 1003, 1004, the Directors of the Company, on calculations made by their Nautical Department, state that she was 1,057 nautical miles from Plymouth. Fol. 1407. Her speed from noon of July 30 to noon of July 31, and from then until 10 P. M. of July 31, had averaged 23 knots, as shown by the chart, Libts. *Ex.* 5, p. 288. At that rate of

speed, she would have made the remaining 1,057 knots in 46 hours, and arrived in Plymouth at 9.45 Greenwich time.

The captain, however, states that the speed for the remainder of the voyage should be taken at 22½ knots. Fol. 1169. On this basis, she would have made the distance in 47 hours and 42 minutes, and arrived at 11.27 P. M.

The captain estimated the distance from the turning point as 1,070 miles, or 13 miles more than the Nautical Department at Bremen, though both made their computations from the same point, viz.: lat. 46° 46′ N., long. 30.21 W. Fols. 103; 1407. The claimant cannot complain if the greater reliance be placed on the careful calculations of their Nautical Department. But, even on the captain's estimate of the distance, the ship, at the rate of speed she had been making on July 31 and the day before, 23 knots, would have covered it in 46 hours, 30 minutes, and arrived at 10.15 P. M. of August 2.

If the captain's larger estimate of the distance, 1070 knots, and his own estimate of the speed that would have been made in the last stage of the voyage, 22½ knots per hour, fol. 1169, be taken as correct, the ship would have covered the distance in 47 hours, 34 minutes, and arrived at 11.19 P. M. of August 2, 1914. She had arrived before or about midnight on her four previous voyages, Libts. Ex. 6, p. 296.

It is clear that the captain expected to arrive on August 2, before midnight, from the entry on the chart, *Libt's. Ex. 5*, p. 288, which was afterwards deleted, viz.: "*Arrived in Plymouth on 2 Aug.*"

The only importance attaching to the time of

arrival, *i. e.*, whether it would have been before 12 P. M., or between then and 1 A. M. of August 3, the latest hour stipulated for her arrival, fols. 661, 662, lies in the captain's statement that, if she arrived before midnight, she would have landed her gold and passengers immediately, fol. 1175, and sailed again within about an hour, fol. 1187, or about 1 A. M. of August 3; while, if she arrived after midnight, the gold and passengers would have remained aboard until 5.30 A. M. of August 3. Fol. 1177.

On the four previous voyages beginning in April, after the Winter and early Spring storms were over, the steamer left New York at the same hour as on this trip, 1 a. m., and reached Plymouth and sailed again at the following times, *Libt's. Ex.* 6, p. 296:

April 26th, arrived Plymouth 11:54 p. m. sailed 27th 0.42 a. m.

May 24th, arrived Plymouth 10:12 p. m. sailed 24th 10:54 p. m.

June 22nd, arrived Plymouth 0.12 a. m. sailed 22nd 1.12 a. m.

July 9th, arrived Plymouth 11:12 p. m. sailed 10th 0.6 a. m.

The table, *Libt's. Ex. 6,* proves that the captain's evidence is wrong on two points: 1, the voyage on which the steamer reached Plymouth June 22nd shows that, arriving 12 minutes after midnight, the passengers and cargo were landed at once, and the vessel left within an hour—indicating that arrangements could be made for quick dispatch even if the vessel did not arrive before midnight; 2, the voyage on which she

arrived March 30 at 4 a. m. and left at 5:18 shows that arrangements could be made even when the vessel arrived four hours after midnight for such dispatch that she could leave within 1 hour and 18 minutes, and before 5:30 a. m.

Taking all the foregoing circumstances into account, there is no fair ground to doubt that, if the steamer had not turned round on the night of July 31st, she would have reached Plymouth before midnight of August 2, or at the worst so near to it that she could have sailed again within an hour.

She would then have made Cherbourg about 6:30 or 7 a. m. of August 3rd, fols. 1186, 1187, and left there within an hour, fols. 1188, 1189; she would have had 11 clear hours of sailing before France declared war, August 3, 7 p. m.; and would have reached Bremen about 6 o'clock on the morning of August 4, or 17 hours before England declared war, August 4, 11 p. m.

Plymouth afforded facilities for securing additional coal if required for the steamer. Fol. 1230.

The North German Lloyd owned or controlled its own tenders both in Plymouth and Cherbourg and had agents in both places. Fols. 1228-1230, 1178-1179, 1188-1193. It appears that none of these agents who were in a much better position than the owners in Bremen to know of conditions in and about the discharging ports sent the master any message warning him of even possible dangers of continuing and completing his voyages. Fols. 1110, 1156. None of these agents has been called to state an opinion that the voyages to those ports could not have been safely completed.

The record is barren of any suggestion that during this time there were any French warships in the English Channel or North Sea which, if ordered to do so, could have arrested and restrained the *Cecilie* before she reached Bremerhaven. The French fleet was concentrated in the Mediterranean. Fol. 826.

The master did not have knowledge of his own that any war vessels were in the English Channel. Fols. 1174-1175, and until stopped by the directors' cable he was convinced that war would be averted. Fols. 1199-1201.

There is not a word of proof that France captured, stopped or searched a single German vessel at any time or place before England declared war on the night of August 4, long after the *Cecilie* would have reached Bremerhaven or that there was danger France would do so.

Proof that France was not on the lookout for German vessels between the date of her own declaration of war, August 3, at 7 P. M., and that of England, August 4 at 11 P. M., is found in the stipulated facts that the Hamburg-American Line steamer *Slavonia* was allowed to pass Dover from Libreville, French Congo, on August 4th, and that the German steamer *Ophelia* cleared and sailed from London for Hamburg, on August 4, both without the slightest interference by the French. Fol. 871.

The actions of the French Government on land also indicate that it was endeavoring to avoid the outbreak of hostilities and not to do anything that might be construed as hostile before a declaration of war.

On August 1, the French Government informed the British Government that they would respect

Belgian neutrality, fol. 776, and there was a peaceful parley with the German Ambassador at Paris looking to a peaceful solution to the impending controversy. Fol. 777.

On the same date French troops were ordered not to go nearer than ten kilometers to the German frontier. Fol. 780. The French orders for general mobilization were stated to be for purely defensive purposes. It was stated that French troops would not attack and that ten kilometers were left between the French troops and the frontier. Fols. 780, 781. The German Ambassador was informed that the French mobilization did not necessarily entail war, and the German Ambassador was invited to remain in Paris. Fol. 792.

On August 2, German troops crossed the French frontier and fired on the French troops which were back eleven kilometers from the border, entailing skirmishes between reconnoitering parties. France stated that she regarded these attacks as "attempts to force her into war." Fols. 814, 815. On the same day the French Government protested to the German Government against the action of German troops in crossing the frontier on the ground that these acts "are not justified by anything in the present situation." Fols. 816, 820.

The German Secretary of State on receipt of the protest said that he "had no knowledge of the facts," and intimated that the collision had been accidental and was unauthorized. Fols. 821, 822.

On August 3, martial law was proclaimed in France. Fol. 832. At 6:45 on that afternoon, the German Ambassador delivered Germany's declaration of war. Fols. 836-840.

Germany in her declaration of war alleged that hostile acts had been committed by French aviators previously to the delivery of the declaration. Fols. 837, 838. These charges were denied by the French Ambassador at Berlin, *French Diplomatic Correspondence*, No. 155, and by the French Premier in his address before the Chamber of Deputies on August 4, *French Diplomatic Papers*, No. 159, when he stated:

"At no time has any French aviator penetrated into Belgium, nor has any French aviator committed in Bavaria nor in any other part of Germany any hostile act. The opinion of Europe has already done justice to these wretched inventions."

Thought doubtless the Court will wish to refrain from passing judgment on this point, it is nevertheless clear at least that there is no preponderance of evidence adduced by the claimant showing that the French committed the slightest hostile act of any kind previously to her declaration of war.

The contention that a state of war existed before the date when France and England declared that it existed cannot be supported by authority. The case of *The Amy Warwick*, 2 Black., 635, cited by the claimant, is not in point. The Court was there considering a case of *civil* war or rebellion as to which Mr. Justice Grier, at p. 667, said:

"A civil war is never publicly proclaimed *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know."

The Court there found that the war began, so far as the United States was concerned, by the

declaration of a blockade on April 27, 1861. P. 666.

Where, however, governments declare, as England and France did, the precise time from which they consider themselves to be in a state of war, it is not open to private litigants to claim that the governments were at war before that time or to presume that they would have exercised rights of war which they did not in fact exercise before such time. What the German Government may have considered is unimportant, since there was no risk of capture from that source.

The attitude of England was altogether against the exercise of any assumed right to arrest or detain steamers before an actual declaration of war, and her practice accorded with her professions.

A report was received in England on August 1st that Germany was detaining British steamers in Hamburg. England requested that orders be given that they be allowed to proceed without delay. The German Secretary of State expressed the greatest surprise and annoyance, and promised to send orders at once to allow the steamers to proceed without delay. Fol. 799.

On August 2nd, the German Secretary of State informed the British Ambassador that orders had been given to allow British ships in Hamburg to sail, explaining that the reasons for the detention were that mines were being laid and other precautions taken. Fol. 810. Later, on the same day, the British Foreign Secretary telegraphed to the British Ambassador at Berlin in relation to cargoes of sugar which he was informed were being landed from English steamers in Hamburg, requesting that the orders issued to allow British

ships to depart should also cover the release of their cargoes, "the detention of which," he stated, "cannot be justified." Fols. 824-825.

On August 3rd, the British Ambassador replied that no information was available regarding the detention of British ships at Hamburg. Fols. 831-832. On the same day, the German Embassy at London issued an explanation of the recent interference of British ships by German war vessels, saying "This action was merely a police "measure and there was *no intention on the part "of Germany to interfere with the property of the "vessels.* The *Castro* was ordered to Hamburg "because it was undesirable that any commercial "vessel be in the Kiel Canal, while in the case of "the *Saxon* the German government had pur-"chased the coal long before from the firm to "which it was consigned and had ordered the de-"tention of the vessel at Hamburg." Fols 833-835. The statement that there was no intention on the part of Germany to interfere with the "prop-"erty of the vessel" could only have meant that Germany did not intend to seize the vessels as prizes of war.

On August 4, the British Foreign Minister telegraphed the British Ambassador at Berlin "to "protest against detention of British ships, at "Hamburg, Cuxhaven and other German ports *"as unjustifiable and in direct contravention of "international law* and of the assurance given to "British Ambassador by German Chancellor." Fol. 858. This message clearly expressed the English view that it was contrary to international law to detain ships before a declaration of war.

It is not to be presumed that England would have herself committed such a breach of inter-

national law as that against which she was then protesting to another nation.

During this entire period, German ships had been allowed to clear from British custom houses, and to pass along the British coast without molestation.

On July 31, five German steamers cleared and sailed from London and Shields for Germany and Rio. Fols. 758, 764.

On August 1st, the German steamer *Reichenbach* sailed from Liverpool for Gothenburg; the German steamers *Norstr* and *Uranus* cleared at the London Custom House for Hamburg; the German steamer *Emma Minlos* cleared at the same custom house for Genoa; the German steamers *Breslau* and *Borussia* cleared from the same custom house for Stettin and Cologne respectively; the German steamer *Prinz Regent* cleared from the Custom House at Southampton and sailed for Durban. Fols. 770-771. The Hamburg South American Line steamer *Rio Pardo* signalled off Lands End for Hamburg; the German East African steamer *Swaopmund* passed Beachy Head; the Hamburg-American liner *Cheruskia* passed Gibraltar; the Hamburg-American steamer *Schwarzwald* passed the Lizard for Havre and Hamburg; the Hamburg-American Line steamer *Wurtenberg* passed Gibraltar for Hamburg; the Hamburg-American Line steamer *Rio Pardo* passed Dover; the North German Lloyd Line steamer *Main* passed Dover; the German steamer *Breslau* sailed fom Gravesend for Stettin; the North German Lloyd Line steamer *Willihad* left Quebec. Fols. 801-805.

On August 2, the Hamburg-American Line

steamer *Almiria* passed Beachy Head; the Hamburg-American Line steamer *Schwarzwald* passed Dover; the German steamer *Emma Minlos* sailed from Gravesend for Genoa. Fols. 811-812.

On August 3, the Hamburg-American Line steamer *Bohemia* passed Brow Head for Hamburg, fol. 828; the Hamburg-American Line steamer *Kronprinzessin Cecilie* passed through the Channel bound east, and, on sighting searchlights, she turned around at 11 P. M. and put into Falmouth early on the morning of August 4. Fols. 848, 849. It does not appear that she made any attempt to proceed or was restrained in any manner until 6 A. M., of August 5, after the declaration of war, when she was seized. Fol. 855.

On August 3, at 4.30 P. M. the claimant's steamer *Kronprinz Wilhelm* cleared from the Custom House at New York for Bremen.

On August 4, the German steamship *Ophelia* cleared from the Custom House at London, and sailed for Hamburg; the Hamburg-American Line steamer *Slavonia* passed Dover from Libreville, French Congo. Fol. 871. The German steamers *Prinz Adalbert* and the *Kronprinzessin Cecilie* of the Hamburg-American Line were free to leave the harbor of Plymouth that day. *The Prinz Adalbert* and *The Kronprinzessin Cecilie*, 1916, 32 Times L. R., 378; 1916, P. 81.

In the Court of Appeals Judge Dodge considered the facts in detail with respect to the probable arrival of the *Kronprinzessin Cecilie* at Plymouth and Cherbourg. He found, p. 442, that the steamer would have delivered her cargo at Plymouth by 1 A. M. on August 3rd, and at

Cherbourg by 8 A. M. on the same day, and he said, p. 442:

"The evidence shows no reason for apprehending detention at Cherbourg before 8 a. m. on August 3, nor until after 6.45 p. m., on that day. Nor is any reason shown for apprehending capture on the way from Plymouth to Cherbourg and thence to Bremen. English men-of-war only could have interfered with the ship, and she would have been at Bremen before any state of war with England existed. German vessels are shown to have used English ports and coast waters unmolested during the whole of August 4. Germany's refusal to give the requested assurance regarding Belgium, the determining cause of England's participation in the war, did not become a certainty before the last hours of that day.

"So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose. The carrier's abandonment of the voyage deprived the shippers of the specie of all chance of having it so delivered. Thereby the carrier took the risk that the actual course of events might fail, as it did, to show actual and immediate danger threatening the ship, either at the time or before she could have made delivery."

c. These circumstances indicate that the directors acted merely *quia timebant,* without any compulsion of necessity, and that if the master had continued his voyage, the libelant's cargo

could have been safely delivered in accordance with the contracts. It cannot be said, certainly, that the preponderance of the proofs shows that this would not have been the case.

d. The exceptions of arrest and restraint of princes in the bill of lading cannot be enforced as just or reasonable when sought to be applied to a state of things which do not constitute anything in the nature of an accident, present peril or danger of navigation. In *The Folmina* [1909], 212 U. S., 361, the Supreme Court reiterated the principle that it enunciated in *Liverpool and Great Western Steam Navigation Co.* v. *Phenix Insurance Co.*, 129 U. S., 397, 437, and reaffirmed the qualifications and limits to which special contracts of common carriers should be upheld as follows:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld—such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against * * *."

Bearing in mind that the burden of proof of showing that a loss within the exceptions is to be established by the petitioner, there is not any ground on which it is possible to claim that the facts here proved show that any accident or danger of navigation or an arrest and restraint of princes that human skill or diligence could not guard against had occurred on July 31, 1914. There was nothing in the path of the steamer, so far as the proofs show, that could have constituted a danger in her navigation even to her ulti-

mate destination. Certainly there was nothing between her and the destination at Plymouth and Cherbourg.

The allowance of the exceptions as a justification for a mere prudential action, not compelled by any existing necessity would whittle away the obligation of a common carrier.

Moreover, if the exceptions should be construed in that way, they would clearly be void under the terms of the Harter Act which prohibit a carrier from inserting in a shipping document a clause "whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

VI. The claimant's defense under the German law is not established.

The claimant pleaded in its answer that

"The instructions received from her [the ship's] owner, as contained in the wireless message aforesaid * * * and the action following them were * * * the exercise of a right given by the laws of the United States as well as by Article 634 of the Maritime Code of the German Empire, which provides in substance that *if a war be declared after the commencement of a voyage, in consequence of which a vessel or the goods shipped thereon can no longer be considered free, and would be liable to capture,* either party has the right to withdraw from the contract without being liable to damages, and by Articles 669 and

670 of said Maritime Code, and by other provisions of the laws of Germany. Fols. 51, 52."

The concessions in this paragraph of the answer are important. It is admitted, in effect, 1, that turning back to New York on July 31st, constituted a withdrawal from the contracts of transportation; 2, that such action would not be justifiable, under the laws of the United States, or of the German Empire unless, a, war be declared after the commencement of the voyage, b, in consequence of such war the ship or the goods thereon can no longer be considered free, and, c, would be liable to risk of capture.

The plea, on its face, seems wholly to destroy the claimant's case. When the ship withdrew from the contract on July 31, a war had not been declared between Germany and any other country, b, the ship and goods were both then free, and, c, neither the ship nor the goods was liable to the risk of capture.

Section 629 of the German Maritime Code provides that either party can withdraw from the contract,

"When before the commencement of the voyage a war has been declared in consequence of which the vessel or the goods to be shipped according to the contract of affreightment, or both, can no longer be considered free and would be liable to risk of capture." Fol. 1267.

Article 634 gives a similar right when the incidents referred to in article 629 occur subsequently to commencement of the voyage.

None of these provisions could possibly help the defense because the conditions under which they could become applicable did not exist.

There was not any declaration of war on the 31st of July by or against Germany and it could not be claimed that the vessel or cargo were not free.

Even the declaration of war against Russia the day after the owners recalled the vessel would not bring the provisions of the code into operation. Not even after that declaration was the steamer liable to risk of capture.

The only evidence in the case on the subject of Russian vessels is the statement of the master that they never got out of the Baltic. Fol. 1091.

It is improbable that the German law has any application to the contract in this case. The bill of lading provided specifically that the shipment was subject to the provisions of the Harter Act. As the contract was made in New York, the law of the United States would govern the nature, application and interpretation of the contract unless it should appear that the parties intended to be bound by the law of some other country. *Liverpool & Great Western Steam Co.* v. *Phoenix Insurance Co.*, 1889, 129 U. S., 397.

It does not appear that there was any intention of the parties here that German law should govern. The cargo was not consigned to a German port, and there was no provision for the application of German law. The law of the United States must, therefore, apply. But, as the claimant pleads that the law of the United States and that of Germany are alike on this subject, the point is unimportant except that the plea indicates that the defense is bad under both systems of law.

VII. The decisions relied on by the owners are plainly distinguishable on their facts and do not support the owners' contention.

Pole v. *Cetcovich*, 1860, 9 Com. Bench N. S., 430, was an action for breach of a charter-party under which an Austrian vessel engaged to go to Havana, there load a cargo and proceed therewith to Falmouth for orders and thence "to a safe port" within certain limits and deliver the cargo.

On the arrival of the vessel at Falmouth the charterers gave orders to proceed to Copenhagen. At this time war had broken out between France and Austria, and there being several French cruisers in the offing, the master then advised the charterers that he could not undertake the voyage to Copenhagen

"Without running imminent risk of being captured by the French cruisers. I do not decline going wherever you may order me, as soon as the navigation is free. If you really want me to proceed to Copenhagen, insure my ship and freight fully and I shall go at once. * * * Awaiting your ulterior decision, with respects, &c."

The Court considered that the letter of the master did not constitute a refusal to go to Copenhagen, but if it did there was no more than a delay which did not amount to a complete breach.

It will be seen, therefore, that the contract in *Pole* v. *Cetcovich* required the master only to go to a safe port. This meant a port that the vessel could safely approach and leave. *Mencke* v. *A Cargo of Sugar*, 1902, 187 U. S., 248, and cases there cited.

With French cruisers in the offing the master could not safely proceed to the port of Copenhagen in view of the actual existence of war against the country of his vessel, and "imminent risk of being captured by the French cruisers."

The obligation of the *Kronprinzessin Cecilie* to deliver at Plymouth was not subject to any qualification that the port must be safe for the steamer. Even if it had been the master would have been bound to go for there was not any existing war between the country of the steamer's flag and any other country and there were not any hostile cruisers in the steamer's path.

In the *Teutonia*, 1872 L. R., 4 Privy Council, 171, the action was for breach of charter in not delivering cargo at Dunkirk. Under the charter the Prussian Brig *Teutonia*, on receiving cargo, undertook to proceed to Falmouth for orders and thence to proceed "to any one safe port in Great Britian or on the Continent."

The vessel arrived at Falmouth on July 10, 1870, and the master whilst there heard rumors that war was probable between France and Prussia. Notwithstanding that intimation, when the next day he received orders to go to Dunkirk, he set sail at once.

When the Brig arrived fourteen miles off the port about midnight on July 16, the regular pilot in official uniform told him that war had been declared two days before. Inasmuch as the entire cargo was suitable for the manufacture of gunpowder, the master did not consider Dunkirk a safe port and he asked the pilot where he could go in safety to ascertain whether war was actually declared or not. The pilot took the master to the Downs where he anchored on Saturday, the 17th. On the 18th, while he was ashore at Deal, the German Counsul told him that war had broken out.

On the 19th of July, declaration of war was made by France on Germany, and the master took

his ship into Dover, under orders from his father, who was owner of the vessel. The master subsequently declined to proceed to Dunkirk.

The Privy Council held, that, p. 179:

"The master of the *Teutonia* when he was informed, on his arrival off Dunkirk by the pilot, although incorrectly, that War had been actually declared two days before, was entitled to pause and to take a reasonable time to make further inquiries, and that he did not exceed the limits of a reasonable time in making inquiries."

It will be observed that in this case also, the master was merely obliged to proceed to a safe port. The circumstances detailed to him by the regular pilot in official uniform indicated that the port was not safe.

The Court held that the master was entitled to further time to learn whether or not the information given to him was correct. The action taken by the master was not outside the contract but related expressly to one of the provisions of the contract, namely, the determination whether the named port of destination was safe.

That case cannot have any application on the facts presented here, for the only information that was given to the master of the *Kronprinzessin Cecilie* was false and came not from a disinterested source, but from the vessel's owners, coupled with their order that the master should abandon his voyage.

It is doubtful whether even the latitude allowed to the master by the English Court to verify the information would be given by the courts here, in view of the language of Chief Justice Marshall in *King* v. *The Delaware Insurance Co.*, 1810, 6 Cranch, 71; "It would be dangerous in the ex-

treme if any false intelligence received on a voyage might justify a captain in acting as if that intelligence were true."

Certainly in this case justification for the breach of contract cannot be sought in any reliance by the master on false information sent to him by his owners.

It is interesting to note that the information given to the master of the *Teutonia* that war was probable between France and Prussia did not deter him from sailing to a French port. In our case, on the other hand, on information that war was probable between France and Germany, the German directors recalled the *Kronprinzessin Cecilie* and would not let her proceed to the port of Plymouth which was in every way safe for the steamer.

The *San Roman,* 1873, L. R., 5 Privy Council 301, was another suit by a charterer for damages because of alleged unreasonable delay in the performance of the voyage. The vessel was chartered to carry a cargo from Vancouver to Queenstown or Falmouth for orders for a port of discharge. The charter contained the exception "restraint of princes."

The vessel took on cargo and put into Valparaiso for repairs in August, 1870. Since the vessel sailed from her loading port war had broken out between France and North Germany and the vessel remained in Valparaiso through fear of capture until the latter part of December, when she proceeded on her voyage.

The Court found that is was generally known at Valparaiso that French war vessels were continually sailing in and out of Valparaiso during September, October and November, and that the German captain "could come to no other reason-

able conclusion than that the principal object of these French war vessels, of which at one time there were five, in Valparaiso, must have been to capture German vessels." P. 306.

The Court held that under the circumstances a man of reasonable prudence would have waited; and that was all that the Court did hold.

There was an actual existing state of war between the country of the vessel's flag and France and there were actually hostile warships in the vicinity. Neither of those circumstances occurred in the present case.

Nobel's Explosives Company v. *Jenkins*, 1896, 2 Q. B., 326, was a suit by shippers of goods to recover additional freight and expenses they had been obliged to pay to get their cargo forwarded from Hong Kong to the original port of destination.

The cargo was shipped under a bill of lading requiring the *Denbighshire* to deliver "at Yokohama or so near thereunto as she may safely get." There was also the general exception of "restraint of princes, rulers and people" and this special clause:

"In case of the blockade or interdict of the port of discharge, or if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods."

The *Denbighshire* sailed with a cargo of dynamite. After she arrived at Hong Kong war was declared between China and Japan. The dyna-

mite was landed at the Government Magazines at Hong Kong and some months later was sent forward to destination. Mathew, *J.*, said, p. 330:

"There were in port numerous revenue cruisers of the Chinese Government, and within sight from where she lay were two Chinese war-vessels. The fact that the *Denbighshire* had explosives on board was generally known. The captain, in the reasonable and well founded belief that his vessel if he sailed with the plaintiff's goods on board would be stopped and the goods confiscated, telegraphed to his owners for advice, and received from them a reply directing him to land the goods."

The Court held, p. 330, that the war ships of the Chinese Government were in such a position as to render the sailing of the vessel a matter of great danger and constituted a restraint of princes and rulers within the meaning of the exception.

It was also found that the special clause in the bill of lading giving the master discretion about entering the port when he considered it unsafe by reason of war, protected the master.

It was also found that the conduct of the master was justified by reference to the duty imposed on him to take reasonable care of the goods entrusted to him.

Every one of the circumstances on which the court relied in the *Nobel Case* is absent from the present case. Here there was not any declaration of war. There were not any hostile cruisers in the harbor or near it, and there was not any special clause in the bill of lading giving the master discretion as to whether or not

he should proceed to the contract port if he thought it unsafe by reason of war vessels.

In the *Heinrich*, 1871, L. R., 3 A. & E., 424, the action was on a charter-party of the German sailing vessel *Heinrich* for non-delivery of cargo. Under the charter the vessel undertook to receive a cargo in the Sea of Azov and proceed to a safe port in the United Kingdom or on the Continent between Havre and Hamburg. The bill of lading contained an exception of restraint of princes.

The vessel put into Falmouth for orders. In the meantime war had broken out between France and Germany. The master received orders to proceed to Leith but did not do so for fear of armed French national cruisers that were cruising in the English Channel and the North Sea.

The court held that the non-performance of the contract was prevented by restraint of princes.

The *Wilhelm Schmidt*, 1871, 34 Law Times, N. S. 34, was quite similar to the *Heinrich*. In both those cases the vessel was a special carrier and not a common carrier and had undertaken to go only to a safe port. War had actually broken out between the country of the vessels' flag and France, and French vessels were cruising in the Channel while the two vessels in question were in the harbor of Falmouth.

In the *Express*, 1872, L. R., 3 A. & E. 597, the action was for the non-delivery of goods under a charter-party of the German vessel *Express*, for the carriage of a cargo from Taganrog to a port in the United Kingdom for orders. The charter was made in June, 1870.

The *Express* sailed with her cargo, and on August 16 stopped at Algeciras for supplies, where she learned that war had broken out between France and Germany. She then put into Gibraltar and remained there until she obtained news of the armistice between France and Germany. She then delivered the cargo in the United Kingdom.

The court held that the master was protected by a restraint of princes. The chances of his capture were greater than of a possible escape, if he sailed from Gibraltar.

It is to be observed that this was not a case of a common carrier, but that it was a case of a chartered vessel, under obligation to proceed to "a safe port, etc.," and that the question of liability depended upon the determination as to whether the master was negligent in determining that it was not safe to enter his port of destination. A safe port means, among other things, one that can be safely reached. The *Alhambra*, 6 P. D., 68; The *Gazelle*, 128 U. S., 474; *Hayton* v. *Irwin*, 4 Asp., 212; *Mencke* v. *Cargo of Sugar*, 187 U. S., 248, 254-257.

This case does not seem to be different from the *Heinrich* and *Wilhelm Schmidt*, *supra*. There was an actual existing war and preponderating chance of capture if the vessel sailed.

In *Embiricos* v. *Reid & Co.*, 1914, 3 K. B., 45, the action was on a charter-party of a Greek vessel. There was an exception of restraint of princes. The vessel was to proceed to the Sea of Azov and load a cargo of grain for a port in the United Kingdom. She arrived at loading port in October before the war between Greece and Turkey broke out, but while the loading

was being carried on, war was declared. The vessel was unable to leave the Black Sea until after the ending of the war.

The Court held that restraint of princes prevented the shipowners from carrying out the charter, as the vessel would have had to proceed through the Dardanelles and there was no reasonable probability that Turkey would permit Greek ships to pass through during the war.

These are all the cases that are referred to by the claimant as establishing the proposition that "non-performance or delay in performance of the contract will be excused when the facts are such as to arouse in the mind of a reasonable man apprehension of danger to the ship, cargo or passengers."

We can only say that this proposition is not established by any one of the cases and if it was it would not have any application to the facts here. It could not be contended that when the ship was recalled by the owners and sent back to New York there was any danger to the ship, cargo or passengers, nor could there have been any reasonable apprehension of capture for there was not any state of war on which alone any apprehension of capture could have been based.

The owners could not possibly have had any apprehension of capture on July 31 for they knew Germany was not a war. If the master had any such apprehension it could only have been because of the owners' false message.

The petitioner seems to rest its case on the proposition that the decision of the Court of Appeals is at variance with the rule in *The Styria*, 1901, 186 U. S., 1 The variance, however, does not exist.

That case arose under a bill of lading for the carriage of sulphur from Sicily to New York. The bill of lading provided:

a. "Restraints of Princes and Rulers or People excepted."

b. "In case of blockade or interdict of the port of discharge or if without such blockade or interdict the master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe."

(c) "With liberty (in event of steamer putting back to this or into any other port or otherwise being prevented from any acts from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer."

(e) "With liberty either before or after proceeding towards the port of discharge to proceed to and stay at any port or place whatsoever."

The vessel arrived at Sicilian ports on April 21, 1898, and after loading a cargo of sulphur the master learned that war had broken out between Spain and the United States.

Spain had issued a decree in which sulphur was declared to be contraband, and had announced that Spanish cruisers were instructed to seize all vessels carrying contraband to the United States.

On completion of the loading, the steamer was at Port Empedocle in Sicily. Her course toward New York would have carried her along the Spanish coast and through the Straits of Gibraltar, past and not far distant from Spain's prin-

cipal naval base. In view of these circumstances, the master considered it unsafe to attempt to proceed to and enter the port of discharge with the contraband cargo, and therefore, specifically basing his action upon the clauses above quoted in the bill of lading, he discharged and warehoused the cargo at Port Empedocle, notifying the shipper that he did so "on finding risky my passage to New York with the actual sulphur cargo for facts of war." He, subsequently, after the War, transshipped it to New York by another vessel, and the libels were filed to recover damages resulting from a loss in the market price.

In the District Court, Brown, *J.*, said of the facts, 93 Fed. R., 474, 475:

"At the commencement of the discharge of the sulphur at Port Empedocle, the master gave notice to the shippers, and to the Austrian Consul at Girgenti, stating that 'on finding risky his passage to New York with a sulphur cargo, for facts of war,' he discharged the cargo on their account and risk *under the bills of lading.* He testifies that though directed to discharge by the owners, he did not deem it safe to proceed with a contraband cargo, and would not have sailed with such a cargo without knowing certainly that sulphur was free; that he knew sulphur to be contraband of war; that Spain held it to be so; that war existed, that he heard that a blockade of New York was going on; that his course lay along the Spanish coast; that Spanish men of war were looking for ships there; that he believed this report; that the newspapers in Sicily reported the capture of a sulphur ship; that up to the time he left Sicily there was no public or official declaration that sulphur had been excluded by Spain from the list of contraband goods."

Judge Brown then quoted the provisions of the bill of lading above mentioned and said, p. 477:

"Though exceptions a and b above noted in the bill of lading contemplate circumstances of war and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master as the agent of all concerned is still bound to a prudent regard for the interests of the cargo and 'must endeavor to hold the balance evenly,' between ship and cargo when their interests conflict. * * *

"Except, therefore, for the negotiations immediately entered on for procuring an exception of sulphur from contraband, I have no doubt that it would have been both right and the duty of the master for the interests of the cargo as well as of the ship to refuse to sail with his cargo after clearing on April 24th until there was some reasonable assurance of safety. * * * The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or assignee; and before imposing such an expense upon the cargo the master in my judgment was bound, in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard."

The Court concluded, p. 478, that the master was guided in the matter of the discharge by the telegram from his owners,

"rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would

have discharged the cargo—certainly not at the time he did. * * * I must find, therefore, that the ship was not justified by clauses "a" and "b" of the bill of lading above quoted in discharging and storing the cargo on account of the shippers as she did."

It is apparent therefore that the decision of the District Judge, which went against the ship, proceeded solely on a consideration of the question whether the master exercised a sound discretion in determining the matter that was specifically left to his judgment under the clauses in the bill of lading in connection with the circumstances of existing war.

It is true that the Court considered that in determining his course of action under the exceptions in the bill of lading the master was still bound to hold the balance evenly between ship and cargo when their interests conflict. It would be a perversion of reasoning to construe that expression as support for the suggestion that aside from any liberty given by the bill of lading, the master could abandon his voyage because of fear, based on false information received from his owners that if he continued on his voyage his ship might be endangered.

Possible capture of the *Kronprinzessin Cecilie* by British or French cruisers would not have endangered the cargo. The abandonment of the voyage, even on the assumption that war existed, could not be said to be holding the balance evenly between ship and cargo.

Certainly in the absence of war the prerequisite for any chancering of the estimates of safety of the ship as against the cargo did not exist.

In the Court of Appeals in the *Styria,* 101 Fed. R., 728, the Court restated the facts and referred to the risk in the existing state of war that the steamer would have run in proceeding through the Straits of Gibraltar and along the lighthouses on the Spanish coast. It was then said, p. 730:

"The first question to be determined is whether with such a risk involved in the event of the vessel's proceeding with the sulphur on board, the captain was justified in relanding and warehousing it. Three clauses of the bill of lading are relied upon. [The court then quoted clauses a and b of the bill of lading and also clause c, which gave a liberty to transship.] The second clause above quoted was made most prominent upon the argument. * * * We do not find it necessary to discuss this branch of the case because we find in clause (a) abundant authority for a refusal to carry forward the sulphur, while such a condition of affairs existed as that already described as being generally known to exist, when the discharge began on April 27th."

It was finally held, however, that the decree against the ship should be affirmed, but upon the different ground that the master should have heeded the notice in a Sicilian newspaper that the Spanish Government had notified the commanders of its vessels to let sulphur pass free and that in consequence of this notice the master should have reloaded the sulphur.

It is thus apparent that in the Court of Appeals also the rights and liabilities were considered both at the bar and by the Court to depend solely on the exceptions in the bills of lading.

The case came before this Court on a writ of certiorari.

In the statement of the case by Mr. Justice Shiras, 186 U. S. 1, 2, the exceptions in the bills of lading were quoted as follows:

"To be delivered at the port of New York, 'restraints of princes and rulers or people' and other specified perils 'excepted; with liberty (in event of steamer putting back to this, or into any other port, or otherwise being prevented from any cause from commencing or proceeding in the ordinary course of her voyage) to ship or transship the goods by any other steamer.'

"'In case of blockade or interdict of the port of discharge, or if, without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense, and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the postoffice, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility.'"

At the outset of the opinion, on page 9, the learned Judge said:

"It was well said by the District Judge in the present case, that 'though exceptions noted in the bill of lading contemplate circumstances of war, and are therefore applicable in the extraordinary circumstances that arose, still the carrier is not thereby relieved from the duty of acting with reasonable prudence for the interests of all concerned. The master, as the agent of

all concerned, is still bound to a prudent regard for the interests of the cargo, and must endeavor to hold the balance evenly between ship and cargo when their interests conflict.' "

The Court then quoted extensively from the opinion of the Court of Appeals, in which that court had discussed the propriety of the master's action under the special clauses in the bills of lading in relanding the sulphur, and approved the decision reached on that point. It was held further, however, reversing the Court of Appeals that the master was not bound on the facts brought to his notice to reship the sulphur on the steamer and further delay the voyage, and that his action in leaving the cargo there and transshipping it after the war on another steamer was right.

In this Court, therefore, as in the other Courts, the question at issue was whether under the exceptions in the bills of lading the master was justified in discharging the sulphur and failing to bring it forward.

The judgment that he had exercised under the authority granted to him by the special clauses of the contract was the particular matter that was brought in question and considered. On that point Mr. Justice Shiras said, p. 9:

"What those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible but a deliberate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not. *Holliday* v. *Kennard*, 12 Wall. 254.

"Applying these principles to the facts of the present case, we have to inquire whether the conduct of the master of the *Styria* showed a reasonable exercise of judgment, having regard to the rights of the owners of the vessel and those of the several owners of cargo."

This language of the Court is expressly limited to the facts under consideration by the Court.

The duty of the master of a common carrier to hold the balance evenly between the ship and cargo, in determining a course of action under an exception which specifically leaves the decision on a particular matter to his discretion may limit, but it cannot extend the privileges or exemptions placed by the carrier for its protection in the bill of lading.

Even if the master should consider that the situation contemplated by an exception in the bill of lading existed he yet would be bound to act carefully. If he did not he could not claim the protection of the exception.

But always the master of a common carrier must act at the carrier's risk in making his decision. For the carrier insures that he and the master will act correctly, and not merely that they will use care.

Therefore, action by the carrier or master based on a conclusion that a restraint of princes exists when in fact there is no restraint, cannot possibly protect the carrier from the consequences of the error.

Much less could the common carrier claim protection under such an exception when he knows that the restraint of princes does not exist, yet falsely suggests information to the master so that

the latter may act as if in fact the exception were in operation.

What was actually decided by the Court in the *Styria* appears from the following two passages in the opinion, p. 11:

"As both the District Court and the Circuit Court of Appeals held that, within the provisions of the bills of lading, the master had the right to decide on the course to pursue, whether to discharge the sulphur, or to refuse to sail until there was some reasonable assurance of safety, or to immediately proceed on his voyage, it is unnecessary for us to discuss the meaning of the bills of lading in that regard, but only to determine *whether the decision of the master, to discharge and warehouse the goods, was a reasonable exercise of the discretion vested in him.*"

The court considered all the circumstances and came to this conclusion, p. 23:

"Without protracting the discussion, we are of the opinion that the master was justified in landing and storing the cargo that had become contraband by reason of the outbreak of the war between Spain and the United States, and by the Spanish proclamation of April 23; that, having acted reasonably with due regard to the interest of all concerned in so doing, it was not made his duty, by the facts brought to his notice, to reship the sulphur on the *Styria* and further delay his voyage."

It thus appears that all that was decided in the case was that the decision of the master was a reasonable exercise of the discretion vested in him under the terms of the bills of lading; and that was all that the facts required for decision.

In that case there was an actual state of war. The facts in the present case are wholly different, and the terms of the contract are more limited in their scope. On the facts and in law, the cases are entirely dissimilar, and there is no conflict in the decisions.

THIRD POINT.

THE ABANDONMENT OF THE VOYAGE WOULD NOT HAVE BEEN JUSTIFIED IF IT RESULTED FROM AN EXERCISE OF THE MASTER'S DISCRETION.

The petitioner contended and the District Court found that the master was vested with a discretion entirely outside of the bill of lading, to determine whether or not to complete the voyage, and that the master exercised such a discretion after receiving from the owners the wireless message, with its false statement of fact.

We have already considered, *ante* pp. 24-32, that the owners sent the master a specific order to abandon his voyage and return to New York, and that the master treated the message as an order and immediately obeyed it.

Without duplicating that discussion, we refer here to the particular circumstances on which the claim of discretion is sought to be based.

I. The master did not assume to act on his own discretion.

The contention of the claimant that Captain Polack abandoned the voyage to Plymouth in the exercise of his best judgment seems to be based

entirely on the master's replies to two or three leading questions put to him on his direct examination, fol. 1039, as follows:

"Q. And what course appealed to your best judgment as the best course to pursue upon receiving that message? A. Well, *after receiving that message* reading 'War has broken out with England, France and Russia,' there was only one way to do, to go back to the United States, to the west; not to run into any danger.

Q. That seemed to you the best and only course to pursue? A. Absolutely.

The Court: He had specific instructions.

Mr. Larocque: Well, I am asking him what appealed to his judgment, aside from the instructions.

The Court: Aside from the instructions?

Mr. Larocque: Yes.

Q. Aside from the instructions, I am asking you. A. Well, I had already spoken to my chief officer the day before, that I was very anxious to get news from home about the political situation and about this war; because, if we were to run any further, we perhaps would not have coal enough to run if we had to."

This testimony is very far from being a statement that the captain exercised any discretion in going back to the United States. He does not say that he did, and his other testimony, already quoted, shows that he acted only on owners' orders.

While, of course, the captain being in command of the ship had actually to give the orders on board as to the direction in which the ship should be navigated, he did not have any more

discretion than any employe would have who was put in charge of a vessel, or of a carriage, or indeed in any situation with instructions to carry out specific orders. The physical control may be in the employe but he cannot, unless through disobedience, do otherwise than follow out his instructions.

In the Court of Appeals Judges Dodge and Bingham made specific reference to the absence of discretion by the master in acting after receipt of the wireless message from the owners. Judge Dodge, after referring to the statement in the message that war had broken out with England, France and Russia, said, p. 436:

"Neither at the time it was sent, nor at the time it was received, was the statement true as to either of said countries. * * *"

"When the master received the above message, his ship had considerably more than half completed her voyage from New York towards Plymouth in England and thence to Cherbourg in France, the ports at which delivery of the specie shipments on board her had been undertaken according to the bills of lading given for them at New York on July 27. She was a little more than 1,000 miles from Plymouth, the nearer of the two. The message was sent and received in a form such as prevented its above meaning from becoming known to any one but the master, and permitted such meaning to be ascertained by him only through the use of means long before carefully prepared, to be availed of in case the emergency indicated should occur, and kept on board the ship under seal for two years, the seal to be broken by the master only in case he received a message of the character given this message in its untranslated form.

"The master obeyed the order to turn back in-

stantly, before revealing the substance of the message to any other person on board. Nine minutes after its receipt the ship was headed for New York instead of for Plymouth, and the voyage undertaken by the bills of lading had been abandoned. Not until after this had been done did the master inform the subordinate officers and the cabin passengers that he had done it."

p. 437:

"The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back; and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained. As to the circumstances present to the master's mind, it is not contended that he would have turned back except for the message received from the owner, and so far as the message conveyed to him an untrue statement of facts, it can have no weight in this connection. Whether or not actually existing circumstances are shown which would have justified abandonment of the voyage is further considered below. But that any actual exercise of discretion by the master has been shown, in the sense necessary for the application of the above principles, I am in any case unable to believe."

"* * * It is said further that the master turned back not only in compliance with the owner's direction to do so, but in accordance as well with the dictates of his own prudence and sagacity, i. e., in the exercise of his discretion as master under an emergency.

"But this requires, in my opinion, a view not justified by the evidence both of the character

of the message itself and of the master's action upon it. The statement of facts contained in the message, if true, would have of itself required abandonment of the voyage to Plymouth and Cherbourg; and no independent judgment as to its truth by the master was possible. There can be no doubt that the owner meant him to act upon it as if it were true. Coupled as it was in the message with the unqualified order to turn back, I can see no reason to doubt that the instant obedience given that order by the master was the only course really left open to him or intended to be left open to him by the message; there being, as has been stated, no suggestion of any reasons against turning back which the owner could not itself have already considered, and might therefore have demanded an independent judgment on the master's part."

Judge Dodge then referred to the testimony of the master about what he did on receipt of the message and concluded, p. 438:

"If there is any sense in which the master's act in turning back can be called discretionary with him, the above testimony from him seems to forbid any other conclusion than that such discretion as he may have used was directed and controlled by one only of the interests concerned in a degree altogether too great to permit saying that it was discretion exercised by a common representative of all."

Judge Bingham considered the contention of the owners that the master had exercised his discretion in abandoning the voyage, and said, p. 445, that it was clearly shown by the master's own testimony that he considered that he was relieved from exercising his discretion as to the

course the ship should take, if he had coal enough to obey the order to return to New York.

II. If, indeed, the master can be considered as having exercised any discretion or judgment or concurred in judgment with what the owners ordered, it could only be on the assumption that the facts given to him by the owners, in their message, were true. He expressly says that "*after getting that message* reading 'war has broken out with England, France and Russia,'" there was only one way to go. Obviously his conclusion, as he gives it, *was based on the assumption that the message was true.* He nowhere intimates that he would have judged it advisable to return to New York if he had known the message was false. The contrary is proved by the fact that he continued on his way to Plymouth until he received his owners' false message.

The exercise of a discretion presupposes the utmost good faith. While the captain doubtless acted honestly in obeying the order, it cannot be too strongly urged on the court that the testimony of the directors of the North German Lloyd shows an entire absence of good faith. They deliberately told the master a falsehood because they did not dare to rely on his discretion if they told him the truth.

It is a most unconscionable proposition that in such circumstances the owners should ask the court to rule that a lawful discretion was exercised by their servant on the foundation of their own falsehood. The owners' hands are not clean in the matter and they should not be permitted

to gain any benefit from their own wrong. As Chief Justice Marshall said in *King* v. *Delaware Insurance Co.*, 1810, 6 Cranch, 74, where a master was given erroneous information concerning the existence of a blockade:

"It would be dangerous in the extreme if any false intelligence received on a voyage might justify a captain in acting as if that intelligence were true."

All the more, if more be possible, would it be dangerous if owners should be permitted to send false intelligence to the master of their vessel and then seek to justify his action based on such false intelligence.

Judge Bingham found that it would be permitting the owners to profit by a fraud if they should be allowed to claim the benefit from a possible exercise of discretion by the master, based on false statements made to him in the owners' message. Judge Bingham said, p. 446:

"If, however, it could properly be found that the master acted upon the information contained in the telegram, exercised his discretion and determined to return to America, the claimant cannot avail itself of his decision as a defense to these actions. The information which the managing directors gave was false. War had not broken out, but it was purposely stated that it had to control the exercise of the master's discretion, if he wished to exercise it and did not at once follow their peremptory order. To permit the claimant to avail itself of the master's decision obtained under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured

through fraud. That such was the purpose of the managing directors in sending the telegram is plainly deducible from the evidence presented by the record.

III. The owner cannot justify its order by assuming there was a shortage of coal.

It is suggested in the Directors' Statement that the action decided on and the time when the decision was made and communicated to the master were influenced by considerations based on the quantity of coal on board. Fols. 1394-1395; 1406. It was doubtless in the minds of the directors that, if the political situation, after delivery of the gold at Plymouth and Cherbourg, should become so tense as to make it seem to them advisable, for prudential reasons, for the steamer to go around Ireland and Scotland, instead of through the Channel and the North Sea, she might not have sufficient coal left to enable her to reach her ultimate destination.

But the duty of supplying the vessel with a sufficient quantity of coal for the expected contingencies of the voyage in all its stages was on the shipowner. *The Vortigern* [1899], Prob. 140; *Thin* v. *Richards* [1892], 2 Q. B. 141; *McIver* v. *Tate Steamers* [1903], 1 K. B. 362; *Greenock S. S. Co.* v. *Maritime Ins. Co.* [1903], 2 K. B. 657.

The possibility of increased political tension must have been in the owner's mind when the vessel sailed. If in consequence of such tension the vessel should be faced with the necessity of taking an unusual course for the sake of safety, the owners were bound to supply sufficient coal to meet such an expected contingency. The

claimant cannot, therefore, be permitted to justify a course of action which was highly prejudicial to the libelants by considerations arising from a breach of its own duty to provide a sufficient supply of coal.

The circumstance that the orders given to the master to return to New York on July 31 were stated to be in part at least, based on their calculations relative to the coal supply, if it is believed confirms the conclusion derived from other facts and from the order itself, that the owner took the whole responsibility of shaping the return course to New York into its own hands and did not leave the master any discretion on that point.

In the last analysis the master did only what the owners told him to do. The claimant's case must fall unless the owners were justified in sending their false message. There is a complete failure of proof on the claimant's part of any such justification.

IV. The master was without authority or discretion to vary the voyage specified in the contracts which the owner had entered into, as a common carrier, in the face of known risk of the outbreak of war, and under which it had undertaken to carry the cargo subject only to the exceptions contained in the bill of lading.

a. He did not have any general discretion to deviate from the voyage contracted for except under the compulsion of necessity to avoid an excepted peril, imminent, pressing and which had begun to operate.

Such a discretion as might have arisen, in face of such a peril, could only have been exercised in

such manner as tended to promote the success of the voyage so far as possible and not to defeat it.

As Mr. Justice Bailhache said of an exception of King's enemies in a bill of lading in *Morrison v. Shaw S. & A. Co., Ltd.*, 1916, 1 K. B. 747, 758:

"Those exceptions apply and apply only to a carrier who is performing his contract and never to a carrier who is breaking it unless he can show that the loss or damage must have occurred in any event."

The claimant does not make even the pretense in this case that the false message and order that were sent to the master tended to the performance of the contract. The claimant's entire case is an attempt to establish an excuse from paying for the damages resulting from the breaking of the contract.

Parsons, 1 Ship. & Adm., p. 21, speaking of the agency of the master, says, p. 20:

"Generally, on the voyage, he will be regarded, in respect to the cargo, as only master of the ship."

Again, at p. 21, the author says:

"Generally, and in the exercise of his duties as master, he is a stranger to the cargo between the lading and the unlading. But *exigencies and emergencies* may arise, in which the master becomes, *of necessity,* supercargo or consignee, or to speak more correctly, is clothed with whatever agency or authority may be needed to enable him to protect the property and interests intrusted to him."

At p. 23, dealing with the master's authority to act for the cargo during the voyage, he says:

"In regard to the exercise of this power, it can only be said that there must be *an actual and urgent necessity;* and as to the manner of its exercise, much must be left to the discretion of the master. If he acts in good faith, *and under a sufficient necessity,* for the best interests of all concerned, and with reasonable discretion, his acts will be valid. But it is not enough that he acts *bona fide* if *no actual necessity* existed."

The principle on which such an authority is vested in the master is that if a situation of peril arises during the voyage which renders necessary a course of action differing from the normal prosecution of the agreed voyage, he is present, and can see and measure the extent and imminence of the peril; and his experience, presumably, will enable him to determine what, if anything, needs to be done to avoid it.

As the master is without interest in the adventure himself, as a principal, the maritime law imputes to him, for the purposes of the emergency only, an agency from necessity in behalf of the owners of the ship and of the cargo, between whom it is assumed and required that he shall exercise just and fair judgment in what he does. It is an agency additional to and apart from that which he derives from his appointment by the shipowner. It is based solely upon necessity, and is limited by it. It extends only to the performance of acts which the necessities of the moment require. As was said by Chief Justice Waite in the *Julia Blake,* 107 U. S., 418:

"He acts for the owner of the cargo because there is a necessity for someone to do so, and, like every agent whose authority arises by implication

of law, he can only do what the owner, if present, ought to do. *Necessity develops his authority and limits his powers.* What he does must be directly or indirectly for the benefit of the cargo considering the situation in which it has been placed by the acceptance of the voyage." P. 426. "He must do that which there is fair reason to suppose the owner, if present, would do. * * * But, at all events, *the necessity must be such as to connect the act with the success of the voyage* and not for the exclusive interest of the shipowner. * * * All will agree that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that *it can only be done upon the compulsion of necessity,* to be determined in each case *by the actual and impending peril* to which the vessel is exposed." Pp. 427-428.

An unusual course taken as the best means of performing the contract might be justified where it would not be if the performance of the contract was not the inducing cause.

As Lord Ellenborough said in *Blackenhagen* v. *The London Assurance Company,* 1 Camp., 454, where a vessel had been insured on a voyage from London to Revel and after proceeding part way on the voyage had gone back to England in consequence of information of an embargo:

"Here had the ship been coming home as the best means of getting finally to Revel, and there had been a possibility of her being able to accomplish that object when the loss happened, she might still have been considered in the course of the voyage insured; but all thought of completing the original voyage seems to have been abandoned."

b. If the master had turned back to New York, on the night of July 31st, in the exercise of an assumed discretion, such as the claimant contends that he had, his conduct could not have been justified under the limitations stated in the *Julia Blake*, nor under the ruling in *Blackenhagen* v. *London Assurance Co., supra.*

1. He would not have been doing what the libelant, if present, would have done. The libelant was most anxious to have its gold reach London at the earliest moment. Such desire not only would be presumed from the circumstance that the shipment was made on a German vessel bound for a British port, when by waiting another day the libelant could have made the shipment on a British vessel, but the fact is also shown by the cables exchanged with London on the 30th of July, and the 3rd of August. Fols. 151-153.

2. Neither could the master have justified his action by the compulsion of that necessity which develops his authority and limits his powers. He admits that he did not have any news which would have justified him in turning back, apart from the false message that he received from his owner. Fols. 1082, 1174. War had not broken out in which France, England or even Germany was involved. He did not have news that any cruisers were in his path or would be in his path during any stage of the voyage. Fol. 1174. Certainly, there was not an apparent peril of arrest at the time the ship was turned back.

3. Nor would it have been correct to say that the action of turning the ship back to New York

was in any manner connected with or that it arose from a necessity "*such as to connect the act with the success of the voyage* and not for the exclusive interest of the shipowner." Turning back to New York could not possibly be connected with the success of the voyage to Plymouth; it was the negation of any intention to prosecute that voyage further.

V. There was not anything in the circumstances known to the master, apart from the false information communicated to him by the directors, which in any possible view could be urged as justifying a deviation under the compulsion of necessity. Fols. 1156, 1174.

The suggestion was made at the trial that the false message from the shipowner, was a communication which the master was entitled to treat as credible and that it would have justified him apart from the order it contained in turning back on the voyage. If this action had been brought *against the captain* on account of a deviation determined upon by him in the exercise of his unaided judgment, based on false information from the owner that war had broken out, possibly the point might be arguable; but when the action is against the owner, through the medium of the foreclosure of a lien on the ship, it is a most astounding proposition that the owner should be relieved of liability for a deviation on the theory that the master would have been justified in believing its false message to be true, and acting on it accordingly.

Turning the ship back is now known to have been merely a prudential step ordered by the shipowner exclusively for the protection of its

own property which it desired to keep out of the reach of any future peril that might arise if war should have broken out before the conclusion of the voyage. The order was in line with the action taken by itself and other German owners, at even earlier dates, when no pretence of danger from arrest and restraint of princes could have been made. Fols. 1398, 1399.

The claimant's list, p. 354, shows it had recalled five steamers on July 30; its own and other German steamers had been recalled or stopped on the *morning* of July 31. Fols. 673, 676. It is not suggested that these recalls were due to an assumed existence of war, or of any possible arrest and restraint, at those times. If prudential considerations of such a broad character could possibly justify the abandonment of a voyage it would have been much more prudent for the ship not to have sailed from New York at all.

The limitations on the master's discretion in taking a step at sea, which is at variance with the contract of carriage, is clearly illustrated by a decision of Judge Addison Brown, of New York, in the case of *Brauer* v. *Compania Navigacion La Flecha*, 57 Fed. Rep., 403, subsequently affirmed by the Supreme Court.

In that case, the master jettisoned a deckload of cattle from the *Hugo*, in bad weather, without present necessity, and from apprehension of danger in case of further storms. The Court charged the ship with liability for the loss of the cattle, emphasizing the point that the master was unjustified in making the jettison in the *absence of any compelling necessity* and upon *mere apprehension of danger*. Brown, *J.*, p. 411, said:

"The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not

maimed or substantially hurt, was made on the morning of Sunday, the 1st of November; *not from any pressing necessity, but solely from mere apprehension;* and I am further persuaded that there was *no reasonable or apparent necessity* for this sacrifice."

The decison was affirmed in the Circuit Court of Appeals, 66 Fed. Rep., 776, and in the Supreme Court of the United States, 168 U. S., 107, 123, where the Court stated that it found no ground for reversing or modifying the conclusions of fact reached by the Courts below that "sound and uninjured animals" were "forcibly thrown or driven overboard, in rough weather, by order of the master, *from unfounded apprehension on his part, in the absence of any pressing peril to the ship,* and with no apparent or reasonable necessity for a jettison of the sound cattle."

This case reaffirms, in substance, the doctrine enunciated in the *Julia Blake, supra.*

A number of the cases discussed under the Second Point of this brief further illustrate the principle that the master is not entitled to make a deviation from the contractual voyage, in the absence of a present, urgent, and compelling necessity, and that he cannot justify his conduct by reliance upon false information, where he does not take further means of verifying the facts communicated to him.

VI. There is no foundation, in the maritime law, for the claimant's so-called "Rule of Reason."

The claimant, in the Court below, attempted to establish the novel principle that the master

has a wide *discretion* which is called the "Rule of Reason," *entirely outside the contract of carriage,* which would justify him, on an apprehension of future danger, in deviating from the ship's contracts.

This contention seems to have been accepted by the District Judge, for his conclusion is stated to have been made without reference to the terms of the bill of lading. Fol. 1604.

The claimant relied for support of its doctrine on the cases of *Nobel's Explosives Co.* v. *Jenkins* [1896], 2 Q. B., 326; and *The Styria,* 186 U. S., 1, and certain cases affecting chartered vessels that arose during the Franco-Prussian war.

In the *Nobel's* case, a state of war with an immediate, present, threatening danger of "arrest" existed, and in the bills of lading there were clauses which specifically vested in the master a discretion to unload the cargo at such point short of final destination as he might decide upon if he considered it unsafe to proceed with the voyage.

The facts of the *Nobel's* and *Styria* cases are stated and the clauses vesting discretion in the master are quoted in subdivision VII of the Second Point of this brief. The question in each case was whether the master had properly exercised the discretion thus confided to him in the contracts themselves.

There was no question in either case of the discretion of the master, *outside the terms of the contract,* and what was said in the opinions must necessarily be read with reference to that circumstance. As was said by the Supreme Court in *Bardes* v. *Bank,* 178 U. S., 524, 534, "any opinion given here or elsewhere cannot be relied

on as binding authority, unless the case called for its expression."

It is the law of this country, as well as of England, that the master, at his peril, must determine whether the port of destination is a safe port, under the contract, and that he is entitled to pause and make a reasonable investigation before attempting to enter such a port. *Tweedie* v. *Clan Line*, 207 F. R., 70.

There was no question of the liability of the vessel *as a common carrier*, or whether as such carrier she was relieved from liability by an excepted peril in the cases referred to by the petitioner, so that the point that arises in this case was not, therefore, presented for decision. All were cases of special carriers, liable only for negligence; and the point in each case was whether failure to deliver had been due to the negligence of the master in deciding matters which, under the terms of the contracts themselves, had been confided to his judgment and discretion.

On a careful analysis of the cases relied on by the claimant it is found that not one of them is authority for the proposition that the master of a vessel, operating as a common carrier, is vested by law with a discretion, outside of and apart from the contract of carriage, to determine whether he will complete the voyage or not, or will deviate from it, without encountering any actual excepted peril, but merely because he may apprehend danger in the future if the voyage be continued. Any such doctrine would be subversive of the law of common carriers.

It would be especially unjust to admit such a doctrine to determine this case. The claimant

detailed in its brief, in the court below, the circumstances then known to all the world before the sailing of the *Cecilie*, which indicated unmistakably, as the claimant contends, that unless Germany, Russia, France, or England, receded from the public announcements that had been made a war involving some of those powers and possibly all, was probable and more or less imminent.

It was in the light of these circumstances that the claimant in consideration of a prepaid freight of $9,268, which it attempted to stipulate, "will not be returned, goods lost or not lost," undertook to transport the libelant's gold to Plymouth, and forward it to London on the express terms contained in the bill of lading. That contract, and it must be assumed that other contracts were of similar tenor, constituted the master's mandate from the owners for the voyage, and bound him to proceed to destination, unless actually prevented by excepted perils.

The circumstances are, therefore, closely akin to those in the case of *The Roebuck*, 2 Asp. Mar. Law Cas., 387, in which it is held that

"Where a master receives express orders from his owners as to the voyage which he is to make, and the ports to which he is to take the ship, and these orders are given under and with a view to a set of circumstances (political) out of which danger may arise to the ship, and which are known to and discussed by the master and owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages and to other ports."

VII. There is no solid basis for the claimant's further contention that the master possessed a

general discretion which would have authorized him to violate the libelants' contracts without compensating them for their losses, in the supposed interest of a small quantity of cargo valued at about $135,000, and certain passengers destined for Bremen, probably reservists whose greater ultimate security might have been served in the turning of the ship back to New York. This contention, in the last analysis, seems to concede that there was no actual peril to those interests when the deviation was made, but that a danger to them might have arisen after the ship left the English Channel, and before she reached Bremerhaven, on which the master would have been justified in turning back to New York on July 31.

It is to be borne in mind, however, that the burden of proof is on the claimant on all points, and it has not laid a foundation for this contention by any reference to the contracts under which the Bremen cargo and passengers were carried. It cannot be assumed, in the absence of proof, that these contracts carried other or different terms than the contract for Plymouth and Cherbourg. Neither has it been proved that any deviation was really necessary for the safety of the Bremen cargo or reservists, nor that, if any such step would have been required, at any time before reaching Bremerhaven, it could not as well have been taken after the completion of libelant's contract.

The contracts for the Cherbourg cargo were shown to have been in the same terms as those covering the Plymouth cargo. The passenger tickets for Plymouth and Cherbourg were practically identical in substance with the cargo contracts. Pp. 239, 335a. The tickets did not expressly exempt "arrest and restraint of Princes"

but assumed to except liability for damage from causes of any kind beyond the carrier's control, even though such damage or delay may have been caused or contributed to by the neglect or default of the shipowners' servants, or other persons, for whose acts it would otherwise be responsible.

For the reasons already mentioned, the loss to the Plymouth and Cherbourg passengers was not due to causes beyond the carrier's control, since the deviation was not immediately due to any such cause. And so far as the clause attempts to exonerate the shipowners from the negligence or fault of the claimant's servants or directors, it is void. *The Folmina,* 212 U. S., 354, 361, and cases cited.

A further clause in the tickets which assumed to authorize the vessel "to put back or into any port at the discretion of the Commander and to deviate from the direct and customary course," constitutes no defence, since putting back was not due to the exercise of discretion by the commander, but was due to an explicit order from the owner which does not purport to have been based on the existence, at the time, of any immediate necessity. Furthermore, a liberty to deviate does not of itself, apart from some urgent necessity, authorize putting back to the port of departure, or even turning back to a port which has already been passed. *Swift* v. *Furness, Withy & Company,* 87 Fed. Rep., 345.

The authorities bearing on this question are further collated under the Fourth Point of this brief.

It is to be remembered, moreover, that the ship, for her owner's greater profit, was making a series of voyages, or a voyage of different

stages. The interests involved in the different adventures were not all involved in the security of the ship, passengers and cargo in the two last stages of the voyage, and some of those which were involved in the first and second stages were not involved in its third stage.

All interest between libelant's cargo and the ship would have ended and been separated at Plymouth. If a general average loss had occured between Plymouth and Cherbourg, libelant's cargo would not have been a contributory interest. Similarly the Cherbourg cargo would not have contributed to such a loss occurring between Cherbourg and Bremerhaven. From this it would follow that no step involving loss to the cargo or a deviation from the voyage could properly be taken except to relieve the joint adventure from an immediate, existing and certain common peril at the time the step was taken.

The deviation was made in the first stage of the voyage. A danger that might have overtaken other interests in the third stage was of no concern to the interests involved only in the first two stages. If the matter were one of general average no contribution could have been collected from them for a sacrifice made at that time for the exclusive benefit and safety of the interests involved only in the third stage. And if the shipowner for its own interest or the combined interests of all those involved in the third stage of the voyage, chose to anticipate a peril in that stage, and to deviate in the first stage to avoid it, there being then no present peril to the interests involved in the first and second stages, it must answer for the damage caused to them by the premature and unlawful

deviation. The principle to be applied is similar to that enunciated in *Brauer* v. *Compania*, etc., 57 Fed. Rep., 403, 411; 168 U. S., 104, 123, where the ship was held liable for a premature jettison made in the absence of a present peril, but in anticipation of a future danger.

VIII. The contention of the claimant that the master has a general discretion, not specially vested in him under the contract of carriage, to seek a port of refuge for the general safety, in a proper case, has no existence in the maritime law except under the doctrines of General Average; but the doctrines of that branch of jurisprudence cannot justify the directors' order of July 31.

Putting into a port of refuge to avoid present, existing and pressing peril is a general average sacrifice.

If the claimant had felt that it was justified in treating the act of putting back to New York or Bar Harbor as required by any real necessity, it would have made a claim for General Average contribution from the cargo. But as it evidently thought that there could be no claim for contribution, it follows, of course, that it could not have considered either that putting back was legally necessary, or that New York or Bar Harbor could under the circumstances be treated as a port of refuge in the technical sense.

The conclusion of the claimant that it could not claim that putting back was a general average sacrifice was justified, for

1. The act was not done under circumstances of necessity to avoid an imminent danger.

2. The ship was not taken to the nearest reasonably accessible port, which would have been

in the Azores about 400 miles from the point where the ship turned. *Chart,* p. 288.

3. The deviation was due to the owner's fault.

The conditions required to found a General Average contribution are summarized in *Congdon on General Average,* New York, 1913, p. 10, as follows:

"To give the right to claim for general average contribution there must be:

"1. An imminent or impending physical peril common to vessel and cargo.
"2. A voluntary sacrifice or reasonable extraordinary expenditure to avert such peril.
"3. A successful result.
"4. An absence of fault on the part of those claiming contribution.

"It must always be borne in mind that the primary and indispensable requisite, and the very foundation upon which the law of general average is based, is *a common peril to be avoided,* the degree of such peril having been defined by the Courts as follows:

" 'Imminent peril.' *Columbian Ins. Co.* v. *Ashby,* 13 Peters, 331; 'Danger imminent and apparently inevitable.' *Barnard* v. *Adams,* 10 How., 270; *The Star of Hope,* 9 Wall., 203; 'Impending peril.' *McAndrews* v. *Thatcher,* 3 Wall., 347; 'Imminent peril and impending danger.' *Fowler* v. *Rathbones,* 12 Wall., 102; 'Imminent danger.' *The Alcona,* 9 Fed., 172; 'Impending danger of physical injury.' *Bowring* v. *Thebaud,* 42 Fed., 794; 'Imminent peril impending over the whole.' *Ralli* v. *Troop,* 157 U. S., 385; 'Imminent danger to the whole enterprise believed to exist.' *The Wordsworth,* 88 Fed., 313."

It was in relation to claims for General Average contributions that the cases of *Sturgis* v. *Cary*, 2 Curt., 59 and 2 Curt, 382, were decided by Mr. Justice Curtis; and he there affirmed that a sacrifice, to be entitled to contribution, must be made in the presence of an "immediately impending peril."

The cases of the *Robert L. Lane*, 1 Low., 388, and *The Eureka*, 2 Low., 417, in which Judge Lowell considered and gave a wide scope to the master's discretion to give a bottomry bond, in the absence of communication with and instructions from the owners of the property, are greatly modified if not wholly overruled by the later case of *The Julia Blake*, 107 U. S., 418.

It is manifest that there was no "imminent or impending physical peril common to vessel and cargo" and no such "absence of fault on the part of those claiming contribution" as would have entitled the claimant to a contribution towards the expenses of turning back to a port in the United States on July 31, 1914. The case of *Brauer* v. *Compania Navigacion la Flecha*, 57 F. R., 403, 411; 168 U. S., 107, 123, shows that jettison, the most ancient example of a General Average act known to the maritime law, cannot be justified when based on timidity and apprehension of future danger, instead of on a present and urgent necessity. It also shows that, when the act of the master cannot be justified by necessity existing at the time the shipowner must pay the whole loss caused by such act. Yet, if there was not such peril and freedom from fault on the claimant's part as would have justified a claim for contribution, upon what ground can the same facts be claimed to justify a deviation for any

other reason? There is no lower degree of necessity than that required to found a general average claim, that can justify a shipmaster in departing from his voyage and seeking a port of refuge. If the necessity on which such action is taken cannot be truly regarded as founding a general average claim, it amounts to nothing as a defence to a demand for compensation for damages arising from the deviation.

The owner's action in ordering the master to return to New York on false information as the basis of the order, would constitute such fault as to deprive it of any claim to equitable contribution. It could not claim any advantage from its own wrong. *Strong* v. *Scott,* 14 App. Cas., 601. Its action in ordering the vessel to a far distant port instead of to a nearby one in the Azores, would be a fault involving similar consequences. *Schwarzchild* v. *National Steamship Co.,* 74 Fed. Rep., 257.

It is a necessary inference from the *Julia Blake, supra,* and other recent authorities that the ordinary authority of a master has lessened very much in recent years. The electric telegraph has enabled the owner to perform much of the master's work in foreign ports. The system of printed bills of lading, and the extensive development of regular lines of steamers, with their accompanying agents and branches abroad, have converted the master into little more than the chief navigator of the ship. In this service, Captain Polack did not sign the bills of lading or attend to port business at either end of the voyage.

The law as stated, and the older cases supporting the master's general authority, must there-

fore be read subject to the proviso that his position has materially altered of late years; the master has been superseded partly by the owner, and partly by the broker, and the broker's or master's authority is usually strictly defined, as in this case, by the printed bill of lading.

IX. A suggestion was made by the claimant in argument that, whatever the orders from the owners may have been, a discretion remained in the master as to the extent to which he would obey them.

The District Judge seems to have adopted the suggestion. Fol. 1594.

There is no authority for this proposition.

In *Codwise* v. *Hacker*, 1 Caines, 526, the master was directed to proceed with the ship from New Orleans to Havana, and thence to New York. In disregard of those orders, he returned from Havana to New Orleans. An action in damages was brought by the plaintiffs against the captain for breach of orders. The defendant claimed that the instructions vested some discretionary powers in him. The action ultimately failed because of implied ratification of the master's conduct, but, on the question of his duty to obey the owner's orders, the Appellate Court were unanimous. Thompson, *J.*, stated.

"The general principles of law, as applicable to cases of this description are not controverted. There can be no doubt but that *a captain is responsible in damages to his owners for disobedience of orders.*"

Kent, *J.*, said:

"There can be no doubt, I think, but that the defendant was guilty of a breach of orders, in re-

turning to New Orleans from the Havana. Here the deviation from his instructions commenced, and the only question is, whether the plaintiffs have, by their acts and declarations, ratified his conduct, and precluded themselves from the present suit."

The doctrine that the master is bound to obey the owners' explicit orders is also stated in *Robinson* v. *Hinckley,* 2 Paine 547; 20 Fed. Cas. 1013, apparently on the authority of *Codwise* v. *Hacker, supra.*

That was also decided by the Court of Admiralty in England in the case of *The Roebuck,* 1 Asp. Mar. Law Cas., N. S. 387.

In that case, a vessel carried a cargo under a bill of lading from Liverpool for Montevideo and Port Gallagos, Patagonia. It was provided that freight should be paid at destination by the consignee from whom the master was to purchase a return cargo at the last port. The exceptions in the contract included "the Queen's enemies * * * and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind." The master delivered the cargo at Montevideo, but declined to proceed to Port Gallagos, which was then under the jurisdiction of Chili, *on account of rumors of belligerent relations* arising between the Chilian Government and the Argentine Confederation. The managing owner of the ship had followed her to Montevideo; the master expressed his fears of continuing the voyage to the owner, who instructed him that he had considered these matters, and that the master must carry out his bill of lading by delivering his goods at Port Galla-

gos in accordance with his original instructions. The master nevertheless failed to proceed to Port Gallagos, and used the vessel in cruising in the River Plate for a number of months, after which he was superseded. The master thereupon brought an action for his wages, and the owners claimed a forfeiture of wages on account of disobedience of orders. To this plea, the master answered, attempting to justify himself in employing the vessel in cruising against his instructions by reason of the danger of going to Port Gallagos on account of threatening war and the bad state of that port, which he intimated was dangerous also on account of shoals. It was held, in the language of the headnote, that

"Where a master receives express orders from his owners as to the voyages which he is to make and the ports to which he is to take the ship and those orders are given under and with a view to a state of circumstances (political) out of which danger might arise to the ship, and which are known to and discussed by the master and owner at the time when they are given, the master is not justified, out of an alleged apprehension of that danger, in taking the ship on other voyages, and to other ports; and if he does so take the ship, he will not be entitled to recover his wages for the time during which she is engaged against the owners' orders, even if the voyages are for the owners' benefit."

Sir Robert Phillimore, in the course of his judgment, at p. 393, said:

"Some time after Mr. Macdonald's [the shipowner's] arrival at Montevideo, and whilst the coals were still being finally delivered, an important conversation took place between Mr.

Macdonald and the plaintiff. It was to this effect: Capt. Gordon having heard rumors of belligerent relations arising between the Chilian Government and the Argentine Confederation, told Mr. Macdonald that it was considered dangerous in the opinion of persons whom he had consulted, to take the ship to Port Gallagos, and also that he had received information that there was very bad harborage at that place, and upon that ground also it would be imprudent to go there. Now I see no reason to doubt Mr. Macdonald's evidence on this important point, which was to the effect that he told Gordon in answer, that he had considered both these matters and that he must, nevertheless, give him positive and precise orders to take the goods to Port Gallagos, *according to his original instructions* given to him at Liverpool. There can be no doubt whatever that those instructions were perfectly plain, precise, and explicit on that point, so far as the written document goes, and that they were confirmed by the oral instructions given in the conversation, to which I have referred, at Montevideo. * * *

"The master set up as a defence for his conduct that he thought he was justified in so employing the ship by the danger of going to Port Gallagos, and the bad state of that port, and by —and here his excuse seems somewhat mysterious—his arrest and his being compelled by Don Louis [the consignee of the cargo] to go to Buenos Ayres; and, in fact, by reason of his having no choice but to go on the voyages and not to Port Gallagos, owing to his having consigned to and being in the power of Don Louis."

He further said, at p. 394:

"I am bound to say that with respect to the breach of orders, I consider that so far as relates

to the five months during which the ship was going from port to port without the consent and against the orders of the owner, disobedience has been fully established; and as to that I must hold, looking at decided cases and principles to be deduced from them, Capt. Gordon has forfeited his wages for those five months, unless there are other facts which take this case out of those principles."

The Court then considered whether there were other facts taking the case out of those principles, and, finding there were none, concluded, at p. 396:

"I think that * * * during the time that he was navigating the ship against orders for five months, he is not entitled to any wages."

FOURTH POINT.

THE TELEGRAM RECEIVED BY THE MASTER ON THE NIGHT OF AUGUST 1, 1914, TWENTY-FOUR HOURS AFTER THE STEAMER HAD TURNED BACK TOWARDS NEW YORK, PURPORTING TO BE SIGNED "COUNTRY'S NAVAL OFFICE," COULD NOT BE USED TO JUSTIFY THE WRONGFUL DEVIATION MADE TWENTY-FOUR HOURS EARLIER, EVEN IF IT HAD BEEN PLEADED OR PROPERLY PROVED.

It appears from the master's evidence that at 9:45 p. m. on August 1, 1914, about twenty-four hours after the receipt of the cable instructions from the North German Lloyd directors, and the turning back of the steamer towards New York, a message was received by the first wireless operator of the *Kronprinzessin Cecilie*, via Sayville,

Long Island, address to all "debeg" ships [meaning all ships fitted with apparatus of the German wireless company], the translation of which reads as follows:

"Threatening danger of war. Do not touch at "a port England, France, Russia." Pp. 257-259.

The master assumed, though there was no proof of it, that the message had gone to Sayville from Germany, and had been repeated back from there, not especially for the *Kronprinzessin*, but had been picked up by her wireless.

There is no mention in the answer of the receipt of such a message, no claim that the master's conduct actually was or in any circumstances would have been influenced by it, no proof of its authenticity or origin, and of course no plea that it constituted a restraint of princes.

It was not relied upon in either of the courts below as a restraint of princes.

The directors of the North German Lloyd Company, who prepared the written statement constituting their own justification for ordering the steamer back to New York, made no reference whatever therein to this message, nor to any order or warning issued by their government on or about that date.

No proof was offered by the petitioner to establish the origin or authenticity of the message or of its signature, nor was there any proof as to what the "Reichsmarineamt," fol. 1031, translated as "Country's Naval Office," fol. 1034, was, or what authority it had from the government, if it was a bureau or department thereof.

The terms of the message indicate that it dealt with circumstances in advance of actual war. It

refers to "threatening danger of war" only. There is no proof of the authority of those who sent it to issue commands to merchant tonnage in advance of the outbreak of war, and no explanation of the effect which should be given by commanders of merchant ships, like the *Kronprinzessin* under such a message viewed merely as a warning.

This message was first put forward, tentatively, as a defence in the petition for a writ of certiorari, p. 13, and in the brief in support of the petition, p. 50, where it is said:

"This message, which was received by Cap-
"tain Polack of the *Cecilie* on August 1st, raises
"the important question as to whether the order
"in itself does not constitute a restraint."

A similar statement with regard to the message is embodied in the brief on the merits, p. 44, coupled with the unproved assertion that it came

"from a branch of the German Government to a
"German ship after the proclamation of a state
"of war."

This message cannot avail the petitioner as a defence.

The burden of proof rests on a common carrier to prove, by a preponderance of the evidence, that the non-performance of its contract was excused by an excepted peril or by steps necessarily taken to avoid such a peril. *Clark* v. *Barnwell*, 12 How. 272, 280; *The Folmina*, 212 U. S. 354, 363; *The Caledonia*, 157 U. S. 124, 136, 137.

If it had been intended to claim that this message of itself constituted an "arrest and restraint of princes," at a time when no arrest and re-

straint of princes, such as was pleaded in the answer, existed, the first step in the proof of the restraint arising from the receipt of the message would naturally have been proof as to the origin and authenticity of the message, the authority of the sender, and the sense in which it was intended to be understood by those who might receive it. The mere delivery of such a message by the wireless operator to the master of the ship cannot take the place of competent proof of a restraint of princes. The message itself proves no more than that a paper, a copy of which was introduced by the master, was received by him from the wireless operator on the steamer.

That alone is insufficient to prove a restraint of princes in the sense of the exception in the bill of lading. It is insufficient in fact and in law to exonerate the carrier under its contract from liability for the consequences of its wrongful act.

The argument of petitioner's counsel is, that whether or not the directors were justified in turning the ship back on the night of July 31st, yet, if she had continued on her voyage until the night of August 1st, she would then have picked up this particular message, and would have turned round at that time. They claim that this message would have justified the deviation, and thus the voyage in any event would have been stopped a day later than it was.

The whole argument made with reference to this message is pure assumption, and is not founded on the slightest proof.

There is no ground for any legitimate inference that the Captain would have received this

message at all if he had kept on his course. The range and capacity of his wireless installation is not given. If he had continued on his course on July 31st, he would have been more than 1,000 miles to the eastward of the point where he received the message on the night of August 1st, and it is impossible to say that the message would have carried or could have been received at a distance of 1,000 miles further away from Sayville. It appears that he had failed already to receive certain other messages that are known to have been sent through wireless stations on shore.

A general warning to the German Merchant Marine Service had been issued by the German Admiralty on the evening of July 30th, fol. 1398, that his wireless did not pick up. On the night of July 30th, the *George Washington,* which was near by him, replied to an inquiry for war news by saying his last news was from Sayville, "the same which you also have got." Fols. 1080, 1111, 1112. Captain Polack had not got any news from Sayville. Fols. 1109, 1110, 1145.

Whether the reference of the *George Washington* was to the Admiralty warning is not known. Just after he turned the ship on July 31, the *Kaiser William II,* conveyed a message to him, which has all the earmarks of the warning referred to by the directors. It read, "Threatening danger of war is not declared, but take precautionary measures." Fols. 1080, 1111-1112, 1131, 1134, 1135. It did not mention any countries.

The captain does not say what he would have done about this message, if he had not heard from his owners, but his statements that he knew his owners had the means of communicating their

orders to him, fol. 1091, that he had not made inquiries except from passing ships, fol. 1079, and that he was going on with his voyage looking for some information from his Company, fols. 1088-1089, and was convinced until he heard from them that war would be averted, fols. 1199-1201, lead to the inference that he would not have turned back unless and until he heard from them directly.

Captain Polack had not picked up any such message as the *Kaiser William II* reported on the night of July 31st. Fols. 1109, 1110, 1145.

If the Captain had failed to get a message on July 30th, which the *Washington* of his line assumed that he also had received, and had not picked up the message quoted to him by the *Kaiser William II* on the 31st there surely can be no presumption that, if he had proceeded one or two days more on his voyage and had been more than 1,000 miles further from Sayville, he would then have picked up the Sayville message, signed Country's Naval Office. *Exhibit C,* fol. 1030.

Furthermore, it appears that the directors sent to him *via* Sayville an exact duplicate of their message of July 31st. The copy that was sent through the station at Poldu near the Lizard, fol. 1003, reached him on the same night, while the duplicate "which reads just the same," fol. 1019, and was sent *via* Sayville, did not reach him until August 2nd at 11 p. m. Fols. 1023-1025. At this time, his ship was abreast of Newfoundland, *Chart,* p. 288, very much nearer the Cape Race Station. If she had kept on she then would have been at Plymouth.

In this condition of the proofs, it would be quite unwarranted to find, as the petitioner urges, that, if the ship had continued on her eastward course

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until August 1st at 9:40 p. m., she would then have received the message. *Exhibit C*, pp. 258-259.

It is equally uncertain what the Captain would have done on the night of August 1st, if he had gone on until then and had received the message at that time.

The statement of fact in the message was merely that there was "threatened danger of war" which "is not declared." He knew that there was threatening danger of war before he left New York. If he had looked at his bills of lading, he would have seen that "threatening danger of war" which "is not declared" was not an exception contained in them. He was bound to know that a "threatening" danger of any kind, not real, present, existing and imminent, could not justify a deviation from the voyage without making the ship liable to the cargo. His common sense would have told him that there could not be any "arrest and restraint" of his vessel, so long as war merely "threatened" and was "not declared."

That part of the message which said "do not run into an English, French or Russian port" was on its face a general warning only, and was not especially addressed to him. All that it really meant was that war was threatening and that it was therefore advisable not to run into English, French or Russian ports unnecessarily. It is susceptible of the meaning that vessels were advised not to seek shelter from the danger of war in those ports. It fell far short of a command, by anyone shown to be authorized to give it in behalf of the owner of the ship, to violate the owner's contract to deliver a cargo in England or France.

Neither the Captain nor the ship was in the German Country's Naval Service. Fol. 1158. So far as appears, therefore, the Naval Service had no authority to give her any *order* not to enter ports in England, France or Russia. A similar message from our own Navy Department to our own shipping in time of peace would have been of no force as an *order*. It could only be taken as a warning.

The message is not pleaded as "an arrest and restraint of princes," and of course could not be, since an "arrest and restraint" involves a taking possession of the property arrested. *Olivera* v. *Union Ins. Co.*, 3 Wheat., 183, 189.

It is perhaps a sufficient answer here that the deviation was not in fact made by the master in reliance on this particular message. He "turned back" to New York on July 31st on the directors' order alone, and nowhere intimates that he would have taken similar action on any other kind of message. If he had gone forward another day, he might have received reliable advices from other sources that negotiations were in progress which indicated that war would be averted. Nobody can tell what he would have done if the directors had not turned the ship back.

The owners' agents in Plymouth and Cherbourg did not send any message of warning of any kind, and, apparently, must have thought there was no danger in the ship keeping on. Fols. 1110, 1156.

The directors' action caused the deviation, and it is to recover the damages caused by that deviation and not for some other action that might have been taken that these suits are prosecuted.

The claimant is not entitled by its pleading or

proofs to argue this particular question. It is only an afterthought, and quite devoid of merit.

The real truth doubtless is that the German owners felt on July 31st that Austria's war with Servia would probably involve war between Germany and Russia very soon, but that they did not know what other powers would become involved, or when they would be forced into the war; and that, in these circumstances, it would be wiser to break up all voyages of German vessels so as to avoid future political dangers, and deal with claims for damages for broken contracts when they should be brought forward. The petitioner is now seeking to defend against claims for broken contracts on grounds palpably different from those on which the ship was turned back to New York. The petitioner has received the benefit, at the libelant's expense, of the withdrawal of its steamer from the zones of possible future political dangers, though it assumed, for large considerations, to incur the risk of those dangers. As the ship was turned back without having encountered any of the dangers that were specifically excepted by the contracts, the obligations of the common carrier were violated, and the libelants are entitled to redress for their losses.

FIFTH POINT.

IF, AS WE CONTEND, THE ABANDONMENT OF THE VOYAGE WAS NOT DUE, IN A LEGAL SENSE, TO AN ARREST AND RESTRAINT OF PRINCES, IT CONSTITUTED A WRONGFUL DEVIATION, AND ALL CLAUSES IN THE BILLS OF LADING THAT MAY HAVE BEEN DESIGNED TO BAR OR LIMIT ANY OF THE LIBELANT'S CLAIMS FOR DAMAGES WERE THEREBY AVOIDED AND NULLIFIED.

The claimants have pleaded two defenses under the bills of lading to libelants' claims for damages that have been made unavailable by reason of the wrongful deviation from the voyage contracted to be made. The first is a defense to the amount of damages that should otherwise be recoverable for non-delivery of the gold; the second a defense to the claim for a refund of the prepaid freight that was not earned.

1. The first of these defenses is pleaded in paragraph IV of the answer, p. 14, and is based on a sentence in clause 9 of the bill of lading, p. 17, which reads as follows:

"In case of loss, the claimant is to furnish, if required, satisfactory proof of value, and the steamer or carrier shall in no case be responsible for a greater value than that declared by the shippers in the margin, also that incorrect or wrong declaration of the shipment shall release the steamer or carrier from all responsibility."

The value of the gold declared in the margin was $4,942,937.64. The claimant pleads that as the gold was eventually returned to the shippers, who received it without prejudice to their claims,

fol. 79, the clause quoted precludes the recovery by the libelants of the heavy damages due to the wrongful deviation and the non-delivery of the gold in accordance with the contract.

2. The second defense urged in Point VIII of Petitioner's brief in this court, p. 57, is to the claim for the return of the prepaid freight which constitutes an item in the libelants' claim for damages. Fol. 132. The prepaid freight was $9,268, for the carriage of 93 kegs of gold bars, p. 17, fol. 132. Notwithstanding the abandonment of the voyage for which the freight was paid, the petitioner asks leave to retain the freight by reason of the terms of clause 12 of the bill of lading, which reads:

"Also, that freight is payable on the actual value of the shipment. Freight prepaid will not be returned, goods lost or not lost."

The Court below did not pass on these defences, expressly, but it may be inferred from a ruling made that passengers' claims were barred by a notice clause in the tickets, pp. 447, 457, that the Court below was not sensible of the full effect of the wrongful deviation on the provisions of the contracts on which the petitioner relies. The point, for that reason, is brought to the attention of this Court for the guidance of the Court below, in the event of an affirmance on the merits.

A. The general rule that all exemptive clauses in contracts of transportation are avoided by a wrongful deviation is well settled.

1. *Parsons Ship & Adm.*, 172, says:

"It is well settled that, *if the vessel deviates*, and the cargo is insured, the risk terminates,

and the underwriters are exonerated. *It follows, as a necessary consequence, that the shipowners having put an end to the contract existing between the freighter and the underwriter, should stand in the place of the latter, and assume all his risks.*"

The author then refers to *Knox* v. *The Ninetta*, Crabbe 534, and continues:

"And it was [there] held that, by the deviation the captain became an insurer, and the ship was liable for any subsequent loss. This we consider to be the well settled rule of law"; citing *Hand* v. *Baynes*, 4 Whart., 204; *Crosby* v. *Fitch*, 12 Conn., 410; *Bend* v. *The Cora*, 2 Peters Adm., 373, 379, 2 Wash. C. C., 80; *Walsh* v. *Horner*, 10 Mo., 6; *Powers* v. *Davenport*, 7 Blackf., 497.

On page 173 n. Parsons quotes with approval the following passage from *Dunseth* v. *Wade*, 2 Scam., 284, 289:

"If a common carrier attempts to perform his contract in a manner different from his undertaking, *he becomes an insurer for the absolute delivery of the goods, and cannot avail himself of any exceptions made in his behalf in the contract.*"

Scrutton, on Charter Parties and Bills of Lading, 7th Ed., says, p. 240:

"In the absence of express stipulation to the contrary the owner of a vessel, whether a general ship or chartered for a special voyage, impliedly undertakes to proceed on that voyage, without unnecessary deviation, in the usual and customary manner. Deviation to save life will be allowed to the shipowner; *deviation only necessary to save the property of others will not be allowed.*"

P. 242. "But even when there are general words giving liberty to call at ports outside the geographical voyage, these will be cut down, by the special description of the voyage undertaken, to ports on the course of that voyage."

In *Carver's Carriage by Sea*, 5th Edition, Sec. 287, it is said:

"When a vessel has deviated from her proper course the ship owner is not only liable for the delay, but he becomes responsible for any loss or damage that happens to the goods. He is not protected by the exception of perils in the contract. * * * The deviation therefore displaces the special contract."

So in *Story on Bailments*, Sec. 509, it is said:

"If the owner deviate from the voyage he is responsible for all loss, even from unavertable casualty; for under such circumstances the loss is traced back through all the intermediary causes to the first departure from duty."

In *Hale on Bailments and Carriers*, the rule is stated, p. 359:

"Where a carrier, without necessary or reasonable excuse deviates from the usual or agreed route of travel, he is absolutely liable for the goods, without exception from any cause whatsoever. It is wholly immaterial that the goods were destroyed by an act of God, or other excepted peril, or that they would have been likewise destroyed even if the usual route had been followed. This absolute liability rests on the proposition that the wrongful deviation amounts to a conversion and the carrier is further liable as owner until the original owner voluntarily accepts a return of the goods."

In this case, the return of the goods was expressly accepted, without prejudice to libelant's claims. Fol. 79. It amounted, therefore, only to a reduction of the damages due to the conversion.

The most recent case involving that principle of which we have knowledge is the decision of *Morison* v. *Shaw S. & A. Co. Ltd.*, 1916, 1 K. B. 747; affirmed, 1916, 2 K. B. 783. In that case plaintiffs were the holders of bills of lading of wool shipped at New Zealand on the defendant's steamship *Tokomaru* for carriage to London. Each bill of lading contained the words: "Direct service between New Zealand and London," and also the provision: "With liberty on the way to London to call and stay at any intermediate port or ports to discharge or take on board passengers, cargo, coal or other supplies." There was an exception in the bill of lading of King's enemies.

After the wool had been loaded, a parcel of frozen meat was taken aboard for carriage to Havre, which was an intermediate port on the way to London but was not on the direct route. When the vessel was 12 or 13 miles from Havre she was torpedoed by a German submarine and sank with her cargo.

The Court held that the shipowners had deviated in going toward Havre and in consequence the exception of King's enemies in the bill of lading did not avail. Bailhache, *J.*, said, p. 757:

"The effect of deviation is to displace the contract of carriage during and after deviation, and, if Pickford, *J.*, is right, *ab initio*—see his judgment in *Internationale Guano en Superphosphaatwerken* v. *MacAndrew & Co.*, 1909, 2 K.

B., 360. From the point of deviation, at any rate, the shipowner becomes at best a common carrier. The defendants say that he is a common carrier with the common law exceptions of act of God and King's enemies in his favour. Let me assume that, of what use are those exceptions to the defendants in this case? As I understand it, the law stands thus: When a ship deviates and loss of or damage to cargo occurs, either by act of God, or, as here, by the King's enemies, it is not open to her owners to set up either exception. *Those exceptions apply and apply only to a carrier who is performing his contract, and never to a carrier who is breaking it*, unless he can show that the loss or damage must have occurred in any event: see *Davis* v. *Garrett*, 6 Bing., 716, and *Lilley* v. *Doubleday*, 7 Q. B., 510. That he can obviously never do in such a case as the present. The most that can be said is that the *Tokomaru* might have been torpedoed if she had continued on her course to London, and that avails the defendants nothing. The only case that occurs to me as likely to arise in practice in which a shipowner can hope to escape liability for damage to or loss of goods during or after deviation is when the goods perish from inherent vice and would have so perished without deviation; see for example *Internationale Guano en Superphosphaatwerken* v. *MacAndrew & Co.*, 1909, 2 K. B., 360.

"The defendants lastly say that the deviation was not the cause of the loss, and that the plaintiffs cannot recover because they cannot show that the natural and probable result of deviating to Havre was that the *Tokomaru* would be torpedoed. This seems to me rank heresy. A shipowner is an insurer of the goods he carries, subject, if there is a special contract, to the contractual exceptions, and subject, if there is no special

contract, to the common law exceptions of act of God, the King's enemies, and inherent vice. If the goods are lost while in his ship it is not for the goods' owner, in the first instance, to prove anything but the loss. The shipowner, if he denies liability, must then set up the particular exception upon which he relies and bring himself within it.

"Here the exception is the King's enemies, but the defendants are in the difficulty pointed out by Lord Watson in *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, 1887, 12 App. Cas., 518, 526, where he said: 'When a shipowner * * * claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible.' This is equally true whether the exception be contractual or implied by law. Deviation leaves a shipowner defenseless in the face of such a loss as occurred in this case.

"I have to add that throughout this judgment whenever I have spoken of 'deviation' I must be taken to mean wrongful deviation."

On appeal Swinfen-Eady, *L. J.*, said:

"If that be so [that is, if there was a deviation], the remaining question is whether the defendants are protected from liability as carriers by the fact that the loss occurred through the King's enemies. If they, as carriers, were duly performing their contract of carriage, they would not be liable for loss occasioned by the King's enemies. *But they were breaking their contract.* They are quite unable to show that the loss must have occurred in any event and whether they had deviated or not. True it is that there had been no previous warning of danger from submarines,

and that the event which occasioned the loss was wholly unexpected, but this does not assist the defendants. The answer to the argument of the defendants on this point is that given by Tindal, *C. J.*, in *Davis* v. *Garrett* (1830, 6 Burg., 716, 724): 'But we think the real answer to the objection is that *no wrongdoer can be allowed to apportion or qualify his own wrong;* and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done.'" 12 Commercial Cases [February, 1917] 81-92 [1916] 2 K. B., 783, 796.

In *Maghee* v. *Camden & Amboy R. T. Co.*, 1871, 45 N. Y., 514, plaintiff's merchandise had been delivered to a railroad for transportation to New York, the bill of lading containing the provisions "unavoidable accidents of the railroad and fire in depot excepted * * * all rail P. R. R."

The defendants received the merchandise at Philadelphia and transported it partly by rail and partly by water to New York, although the goods could have been transported by rail all the way. After the goods arrived at New York and were at the depot they were destroyed by fire, not caused by defendant's design or neglect. It was held that the defendant was liable. The court said, p. 522:

"When a carrier accepts goods to be carried with the direction of the owners to carry them in a particular way or by a specific route, he is bound to obey such direction and if he attempts to perform his contract in a manner different from his undertaking he becomes an insurer and

cannot avail himself of any exceptions in the contract. * * *

P. 524. "Having undertaken to carry the goods in violation of the instructions in the contract, *he lost the benefit of the exception from liability.*"

In *Royal Exchange Shipping Company, Ltd.* v. *Dixon,* 1886, 12 Ap. Cas. 11, some bales of cotton had been shipped on defendant's steamer on deck instead of under deck, as should have been done. During the voyage the ship took ground, and in order to get her off the master properly jettisoned the cargo. The endorsees of the bills of lading sued the shipowners to recover the value of the jettisoned cotton. *Held* that they were entitled to recover, as the cotton had been carried in breach of the contract and defendants were liable for failure to deliver. Lord Watson said, p. 19:

"At the time when jettison was made on those 125 bales they were being carried in breach of the contract and *were not within the exceptions specified in the bills of lading,* which have exclusive reference to goods safely stowed under hatches. In these circumstances I cannot doubt the appellants are liable to pay to the respondents the value of the 125 bales, seeing that they cannot make delivery in terms of their contract, and have no legal excuse for their failure to deliver."

In *Shaw v. Symmonds,* 1917, Weekly Notes, 92, S. C., 1917, 33, Times L. R., 239, decided March 2, 1917, the plaintiffs, who were publishers in London, entrusted to the defendants, who were bookbinders, books to be bound under a contract by which the books, when bound, were to be delivered to the plaintiffs as and when required by them.

On January 7, 1916, the plaintiffs requested the defendants to deliver to them the books then bound in stock. The defendants did not deliver the books. On January 20th a fire occurred on the defendants' premises which was accidental and not due to any negligence on the part of the defendants, and the plaintiffs' books were destroyed. The Court held that the defendants were liable. Avery, *J.*, said, p. 93:

"Upon the facts I think that the decisions in *Davis* v. *Garrett* (1830, 6 Bing., 716, 724; *Lilley* v. *Doubleday* (1881), 7 Q. B. D., 510; approved in *Royal Exchange Shipping Company* v. *Dixon* (1886), 12 App. Cas. 11, 19, and more recently in *Morrison* v. *Shaw, Savill and Albion Company* [1916], 2 K. B., 783, are conclusive against the contention of the defendants that the breach of contract was not the proximate cause of the loss, or that the damage did not naturally flow from the breach of contract. It is suggested that the principle of these decisions does not apply to an act of omission, as in the present case, but I am unable to appreciate the distinction for this purpose between a breach of contract in not delivering and a breach of contract by delivering at another place."

The carrier has committed a fundamental breach of its obligation towards the shippers. In such a case, it is protected by a provision limiting the amount of its liability. *Tattersall* v. *The National Steamship Company, Ltd.*, 12 Q. B. D., 297. In that case, where the shipowners had committed a breach of their fundamental obligation to furnish a seaworthy ship, the court held that a provision in the bill of lading which purported to limit the liability of the steamer to £5 per head for

each of a number of cattle lost in consequence of the unseaworthiness was avoided, and recovery of full damages was allowed.

Similarly, in the law of insurance, a wrongful deviation avoids a policy and discharges the underwriter.

In *Middlewood* v. *Blakes*, 7 Term. Rep., 162, where the *owner ordered* the master to deviate from the usual route of the voyage at an intermediate point and to proceed thence by an alternative route, it was held by Lawrence, *J.*, that the underwriters were not liable for a capture after the deviation. The owner's order was given to the master before sailing, but was not disclosed. The other judges were of opinion that the policy never attached because of the concealment of the order. Lawrence, *J.*, was of opinion that the insurance was good up to the point of deviation, and void from that point by reason of the owner's order; but that it would have been good from that point if the master had used his own discretion in selecting the alternative route. *Phillips on Ins.*, Vol. 1, §581, supports Justice Lawrence's view.

A departure from the route for any reason not grounded on the compulsion of necessity, avoids the policy. *Burgess* v. *Equitable Mar. Ins. Co.*, 126 Mass., 633; *Craig* v. *United Ins. Co.*, 6 Johns., 226; *Corp. v. United Ins. Co.*, 8 Johns., 277; *King* v. *Delaware Ins. Co.*, 6 Cranch., 71; *Oliver* v. *Maryland Ins. Co.*, 7 Cranch., 487; *Hadkinson* v. *Robinson*, 3 Bos. & P., 388; *Nickels* v. *London & Provincial Ins. Co.*, 6 Com. Cas., 15; *Kacianoff* v. *China Traders Ins. Co.* [1914], 3 K. B., 1121; *Becker* v. *London Assurance Corp.* [1915], 3 K. B., 410.

The conclusion to be derived from these authorities is that the wrongful deviation avoids all the clauses in the bills of lading that tend in any way to discharge or limit the petitioner's liability for the damage that resulted, or to defeat its obligation to refund the unearned freight.

b. Apart from the effect of the deviation in the clause that the carrier shall in no case be responsible for a greater value than that declared by the shippers, that clause, as was pointed out by the Court of Appeals in *The Styria*, 101 Fed. Rep., 728, 735, does not mean that the damages are to be assessed on the basis of declared value, but merely that the declared value "fixed a final "limit of liability beyond which he [carrier] "shall not be required to respond." The rule as stated in that case, in respect of a similar clause, was as follows:

"The statement that the shipowner shall not be liable in any case for more than the invoice value of the goods is a simple and straightforward one. Grammatically constructed, it fixes a final limit of liability beyond which he shall not be required to respond. It does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit. To give them such a meaning would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves had they wished to do so. Of a precisely similar clause the Supreme Court of Massachusetts said:

" 'The words "the liability shall not exceed," etc., are apt words to express the outside limit of the sum to be recovered; but both the particular

words and the whole structure of the sentence are most inapt to express a stipulation that, if the goods are still equal to the invoice value, there shall be no recovery at all.' *Brown* v. *Steamship Co.*, 147 Mass., 60, 16, N. E., 717."

It is a mistake to suppose, as intimated in the dissenting opinion of Judge Putnam, p. 465, that the libelant is endeavoring to recover a loss of exchange on the gold. What the libelant is seeking to recover is the cost of replacing the gold in London on the day when it should have been delivered there. Fol. 127. This is the indemnity to which the libelant is entitled under familiar principles of law. *Nickerson* v. *Soesman*, 98 Mass., 364, 370.

c. The freight prepaid but not earned could be recovered back under general principles of law, apart from the effect of the unlawful deviation on the special contract with regard to it.

It is a well established principle of our law that freight money paid in advance must be returned if the contract of carriage has not been completed.

As freight is the consideration paid for the performance of the contract, unless that contract is fully performed the freight has not been earned, and must be returned in full unless the parties have made a binding agreement to the contrary.

Thus in the *Harriman*, 1869, 9 Wall. 161, a vessel was chartered to carry coal to the Spanish Fleet off the coast of Peru. Certain freight was payable in advance. The ship was unable to find the Spanish Fleet and deliver the coal and the voyage was abandoned. It was held that the

charterer was entitled to recover back the freight money that he had paid and also the value of the cargo.

See also *Watson* v. *Duykinck*, 1808, 3 John., 332; *De Sola* v. *Pomares*, 1902, 119 Fed. R., 373.

In *The Kimball*, 1865, 3 Wall. 37, Mr. Justice Field said, p. 44:

"Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded if from any cause not attributable to the shipper the goods be not carried."

In *Griggs* v. *Austin* [1825], 20 Mass., 20, shippers who had paid freight in advance were held entitled to recover it back as the vessel had been wrecked before reaching destination. Parker, *C. J.*, said at p. 23:

"It is sufficient then to say, that by a reference to the above cited opinion (*Watson* v. *Duykinck*, 3 Johns. R. 335), and the note of Judge Story, it will be found to be the established law of the maritime countries on the continent of Europe that *freight is the compensation for the carriage of goods*, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary."

The same principle was applied to the case of a passenger in *Brown* v. *Harris* [1854], 68 Mass., 359. The plaintiff had paid passage money in advance, but the vessel had been wrecked and the plaintiff had not been carried to his destination It was held that he was entitled to recover back

the whole sum advanced. Thomas, *J.*, said, p. 359:

"The rule is well settled as to freight for the carriage of goods. If freight be paid in advance and the goods are not carried by reason of any event not imputable to the shipper, it is to be repaid unless there be a special agreement to the contrary; and such agreement cannot be inferred from the mere fact of payment in advance. The contract is entire, and unless the voyage be fully performed by a delivery at the port of destination nothing has been earned * * * Passage money and freight are governed by the same rules."

See also *Benner* v. *Equitable Insurance Company*, 88 Mass., 222.

It is urged by the claimant that the language in the bill of lading constitutes a special agreement which takes this case out of the general rule that prepaid freight should be returned where the voyage is not fulfilled. The language of the bill of lading is this:

"Freight prepaid will not be returned, goods lost or not lost."

This language is to be construed most strongly against the carrier, and is not to be determined as entitling the carrier to retain the freight unless the language seems unequivocal and there has been no voluntary breach of the contract by the shipowner.

The language seems to contemplate the possibility that the goods may be lost, but it does not in terms cover the contingency where the ship is not lost, but fails to carry out her contract.

It cannot be contended that the steamer earned her freight on the cargo, for she did not perform

the agreed contract of carriage. She deliberately abandoned the contract.

The parties have not agreed that where performance of the contract is not excused the carrier shall be considered as having earned the freight.

There was no agreement that the freight should be considered earned on shipment and should not be returned in any event, as in the case of *Burne Line* v. *U. S. & A. Ss. Co.*, 1908, 162 Fed., 298. Unless parties have so agreed, the freight, whether prepaid or not, cannot be considered as earned. It should be restored to the shipper where the contract has not been fulfilled, but has been voluntarily abandoned. A carrier which deliberately breaks its contract for which the freight is paid, cannot invoke a term of it for protection against its legal obligation to return the unearned freight. *Morrison* v. *Shaw, Savil and Co.* [1916]. 2 K. B., 783.

SIXTH POINT.

THE ABANDONMENT OF THE VOYAGE AND THE RETURN OF THE STEAMER TO THE UNITED STATES WAS NOT WITHIN THE PROTECTION OF THE CLAUSE IN THE BILL OF LADING WHICH GAVE "LIBERTY TO CALL AT INTERMEDIATE PORTS, OR ANY PORT OR PORTS IN OR OUT OF THE CUSTOMARY ROUTE IN ANY ORDER, TO RECEIVE AND DISCHARGE COAL, CARGO, PASSENGERS AND FOR ANY OTHER PURPOSES."

The petitioner pleaded this clause of the bill of lading as a defence in the fifth paragraph of its answer. P. 15. It relied upon the clause in the District Court, but did not argue the point in the Court of Appeals. It is not relied on in the brief in this Court. We refrain, therefore, from discussing the point at length, and content ourselves with a reference to the cases which clearly show that a wrongful deviation from the voyage, like that which occurred in this instance, is not within the protection of such a clause. *Morrison & Co.* v. *Shaw, Saville & Albion Co.* [1916], 2 K. B., 783, and cases therein discussed, pp. 792-795; *Margetson* v. *Glynn* [1892], 1 Q. B., 340, affirmed [1893], App. Cas., 351; *Leduc* v. *Ward*, 20 Q. B. D., 475; *The Wells City*, 57 Fed. Rep. 317, 318-319, affirmed 61 Fed. Rep., 858, 859; *Schwarzchild* v. *National S. S. Co.*, 74 Fed. Rep., 257; *Swift & Co.* v. *Furness, Withy & Co., Ltd.*, 87 Fed. Rep., 345.

LAST POINT.

THE DECREE APPEALED FROM SHOULD BE AFFIRMED WITH COSTS AND AN INTERLOCUTORY DECREE SHOULD BE ENTERED IN FAVOR OF THE RESPONDENT FOR ITS DAMAGES, WITH INTEREST AND COSTS AND WITH AN ORDER OF REFERENCE TO A COMMISSIONER TO ASCERTAIN THE AMOUNT OF THE RESPONDENT'S DAMAGES.

Respectfully submitted,

J. Parker Kirlin,
Charles R. Hickox,
Counsel for Guaranty Trust Company.

New York, April, 1917.

Office Supreme Court, U. S.
FILED
MAR 17 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 922.

NORTH GERMAN LLOYD, Claimant of Steamship "KRONPRINZESSIN CECILIE,"

Petitioner,

AGAINST

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

AGAINST

NATIONAL CITY BANK OF NEW YORK,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

MOTION TO ADVANCE.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Petitioner.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 922.

NORTH GERMAN LLOYD, Claimant of Steamship *Kronprinzessin Cecilie*,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Writ Granted March 12, 1917.

Now comes North German Lloyd, claimant of steamship *Kronprinzessin Cecilie*, and moves the court to advance the above entitled causes upon the docket and set them down for

hearing on a day convenient to the court during the present term for the following reasons, which are more fully stated in the claimant's petition for a writ of certiorari and the brief filed in support thereof:

1. The libelants have sued the Steamship "*Kronprinzessin Cecilie*" for $2,240,106.69, with interest from August 3, 1914, for failure to deliver certain consignments of gold bullion at the ports of Plymouth and Cherbourg. The District Court has refused to fix the amount of a stipulation for value, upon which the vessel may be released, in any amount less than the total amount of these claims and it is impossible for the claimant to file a stipulation for so large an amount. The claimant is paying the expenses of the United States Marshal for the upkeep and custody of the ship. These expenses are in excess of $600 per day, and if the causes are not set for hearing at an early date the loss to the claimant will be very great.

2. A large number of vessels are in a situation similar to that of the *Cecilie*.

On July 30th and 31st, 23 ships of the North German Lloyd, and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought or remained in neutral ports. Many of these ships, which were unable to deliver their cargoes at their ports of destination, are now in ports of the United States or its dependencies.

3. The decisions herein of the Circuit Court of Appeals affect all vessels of the German Mercantile Marine over which, or over whose owners, the United States courts have, or may obtain, jurisdiction.

4. Many other claims of great magnitude are dependent upon the determination of the principles of liability involved in these cases, and if this court should hold that the *Cecilie* is not

liable, the principles of liability will be determined for all other German ships in a like situation.

5. The case is peculiarly one where a prompt decision is essential to the protection of the rights of the claimant.

6. There is a very general public interest in the matter.

Opposing counsel concur in this motion being made.

Respectfully submitted.

JOSEPH LAROCQUE.
WALTER C. NOYES.
JOSEPH D. BEDLE,
Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
MAR 6 1917
JAMES D. MAHER
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 922.

NORTH GERMAN LLOYD, CLAIMANT OF STEAMSHIP "KRONPRINZESSIN CECILIE," PETITIONER,

against

GUARANTY TRUST COMPANY OF NEW YORK, RESPONDENT.

SAME CLAIMANT, PETITIONER,

against

NATIONAL CITY BANK OF NEW YORK, RESPONDENT.

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S MEMORANDUM.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 922.

NORTH GERMAN LLOYD, CLAIMANT OF STEAMSHIP "KRONPRINZESSIN CECILIE," PETITIONER,

against

GUARANTY TRUST COMPANY OF NEW YORK, RESPONDENT.

SAME CLAIMANT, PETITIONER,

against

NATIONAL CITY BANK OF NEW YORK, RESPONDENT.

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S MEMORANDUM.

I.

A writ of certiorari was applied for by the petitioner well within the time prescribed by section 6 of the act of Congress of September 6, 1916.

The decree of the Circuit Court of Appeals for the First Circuit was entered November 17, 1916.

The application for a writ was made on February 6, 1917, by filing the petition on that day in the office of the Clerk of this court.

No formal submission of the petition could then be made, as the court had adjourned until March 5, but the application was made as of the date when the petition was filed.

To hold otherwise would be to shorten the time allowed by the statute.

II.

The charge made by respondent under point II of its memorandum is irrelevant and unfair:

a. The facts in relation to the damaging of the *Cecilie's* engines are wholly outside of the record.

b. The evidence was uncontradicted that the order to do the damage was not received from the petitioner, but from an entirely independent source.

c. The petitioner has filed in the district court a bond in the sum of $200,000, conditioned to replace the *Cecilie* in the same state that she was prior to the injury.

This bond the respondent has failed to mention, leaving it to the court to infer that its security has been diminished by more than $110,000, which is not in accordance with the facts.

Respectfully submitted.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 922

NORTH GERMAN LLOYD, Claimant of Steamship KRON-PRINZESSIN CECILIE,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

NORTH GERMAN LLOYD, Claimant of Steamship KRON-PRINZESSIN CECILIE,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO PETITION.

KIRLIN, WOOLSEY & HICKOX,
Proctors for GUARANTY TRUST COMPANY OF NEW YORK.

J. PARKER KIRLIN,
CHARLES E. HICKOX,
EDWARD E. BLODGETT,
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SHEARMAN & STERLING,
Proctors for NATIONAL CITY BANK OF NEW YORK.

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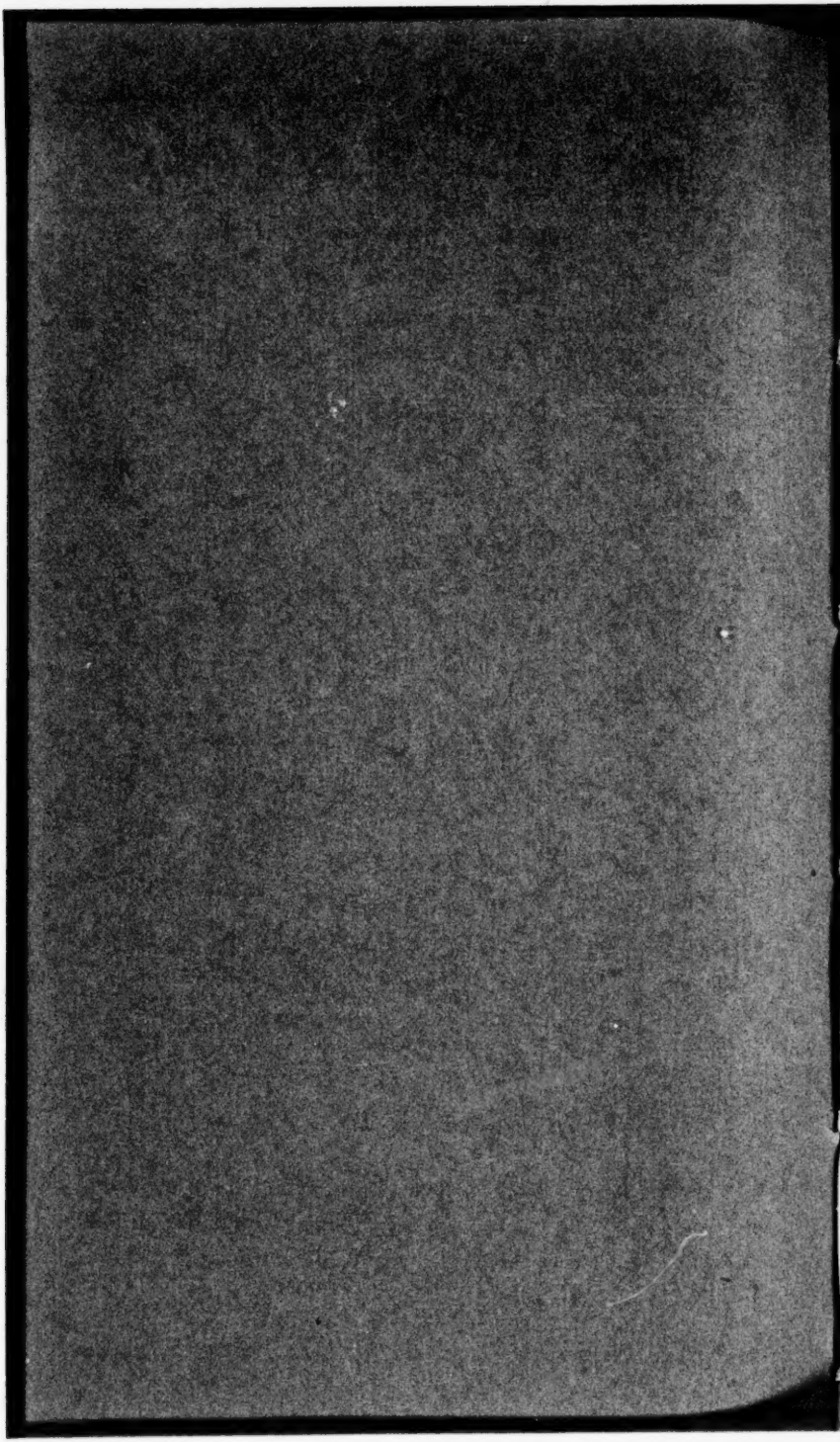

Supreme Court of the United States,

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, Claimant of Steamship KRONPRINZESSIN CECILIE,
Petitioner,

AGAINST

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

NORTH GERMAN LLOYD, Claimant of Steamship KRONPRINZESSIN CECILIE,
Petitioner,

AGAINST

NATIONAL CITY BANK OF NEW YORK,
Respondent.

MEMORANDUM FOR RESPONDENTS IN OPPOSITION TO PETITION.

I.

THE PETITION IS TOO LATE.

The petition in this case seeks to bring up for review by this Court the decree of the Circuit Court of Appeals for the First Circuit, that was entered herein on November 17, 1916. *Record*, p 471.

Section 6 of the Act of Congress of September 6, 1916, entitled "An Act to Amend the Judicial Code", provides:

> "That no writ of error, appeal or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of * * *."

The three months after the entry of the decree complained of in this case expired on February 17, 1917. The petition therefore is presented too late.

II.

EVEN IF THE PETITION CAN BE CONSIDERED BY THE COURT, THE WRIT SHOULD NOT BE GRANTED AT THIS TIME.

The decree of which the petitioner complains, reversed a decree of the District Court, and remanded the case to that court "with directions to enter an interlocutory decree for the libelant and for further proceedings thereon in accordance with law." *Record*, p. 472.

The mandate of the Circuit Court of Appeals was stayed on January 16th until the further order of the Court, but subsequently and on February 7th was sent down to the District Court, when the attention of the Circuit Court of Appeals was directed to the fact that the petitioner, through its servants, had wilfully caused

great damage to the engines of the steamer that was in the custody of the United States District Court. The extent of this damage was estimated at more than $110,000 by a surveyor who had made an examination of the steamer, and testified before the United States District Court on February 17th.

These two suits involve very heavy claims for failure by the steamship *Kronprinzessin Cecilie* to deliver consignments of gold at London and Paris in August, 1914.

Damages are claimed by the respondent Guaranty Trust Company in the sum of $1,786,482.92, and by the respondent National City Bank in the sum of $446,828.47.

Proofs have not yet been offered before a commissioner to establish the damages, but it may reasonably be anticipated that no matter what amount may be awarded by the commissioner and by the Court, objection will be made by either the petitioner or the respondents to the amount of the award.

The case therefore is not ripe for consideration by this Court at this time.

The damages should first be assessed so that if this Court should conclude to review the entire case, it would then be in such position that final determination could be made by this Court.

III.

On the Facts the Petition is Without Merit.

The defense of the German ship owners to their breach of obligation is put forward in two ways.

They claim to hide behind an alleged exercise by the master of an independent judgment to abandon the voyage after he received the wireless message from the owners on the evening of July 31st. If that defense fails they claim that they are protected by the exception in the bill of lading of restraint of princes.

a. The answer to the first defense is twofold.

1. The master did not exercise any independent judgment.

2. If he did it would be unconscionable to permit the owners to take an advantage from their fraudulent act in sending a designedly false message to the master.

1. The question whether the master did exercise any independent judgment is purely one of fact, to be decided on the proofs.

When the master took command of this steamer, nearly two years before his testimony was taken, fol. 1070, he received from his predecessor in command a sealed package with instructions to open the package if he received a wireless message relating to illness and signed Sigfried fol. 1000.

About ten o'clock on the evening of July 31, he did receive such a wireless message relating to illness and signed Sigfried, fols. 1000, 1001; he accordingly opened the package. He then found certain words which being translated by the code that the package contained gave the two sentences:

"War has broken out with England, France and Russia. Return to New York." Perhaps a more accurate translation of the mandatory portion of the message is the phrase, "Turn back to New York." Fol. 89.

So far as this message contained a statement of fact, it was wholly false, for war had not broken out between Germany and England, France or Russia.

Counsel for the shipowners seek to palliate the falsehood of the owners by suggesting that the statement was merely premature or perhaps that it was merely a white lie.

The statement however, was what the District Judge described as an important fact. Fol. 1553. It was, indeed of crucial importance.

Two Judges of the Circuit Court of Appeals have held that the evidence clearly establishes that the master did not exercise any discretion of his own.

Dodge, J., said:

> "But that any actual exercise of discretion by the master has been shown in the sense necessary for the application of the above principles, I am in any case unable to believe.
>
> "The owners' direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. * * * It is said further that the master turned back not only in compliance with the owners' direction to do so, but in accordance as well with the dictates of his own prudence and sagacity, *i. e.*, in the exercise of his discretion as master under an emergency.
>
> "But this requires, in my opinion, a view not justified by the evidence, both of the character of the message itself and of the master's action upon it. The statement of facts contained in the message, if true, would have of itself required abandonment of the voyage to Plymouth and Cherbourg; and no independent judgment as to its truth by the master was possible. There can be no doubt that the owner

> meant him to act upon it as if it were true. Coupled as it was in the message with the unqualified order to turn back, I can see no reason to doubt that the instant obedience given that order by the master was the only course really left open to him, or intended to be left open to him by the message."

Bingham, J., said, after enumerating the defenses of the claimant:

> "It does not seem to me that any of these propositions are right as applied to the facts in these cases. * * *
>
> "That the master, upon receiving the telegram, acted on the idea that he was relieved from exercising his discretion as to the course the ship should take, if he had coal enough to obey the order to return to America, is clearly shown in his answers."

The Judge then refers to various matters in the record, and concludes on this point:

> "From these circumstances and others presented in the case, the reasonable inference is that his course of conduct on the evening of the 31st of July in turning back to America was not due to the exercise of discretion on his part, but was due directly to the order of his superior and in obedience thereto."

Thus it would be impossible for this Court to consider any possible defense based on an alleged exercise of discretion by the master, unless this Court should be prepared to examine the evidence in the record and form a conclusion on the facts contrary to that reached by the Circuit Court of Appeals.

2. If it could be considered that the evidence permitted the conclusion that the master did exercise an inde-

pendent judgment, the owners could not claim any benefit, for they would thus be profiting by their own wrong.

The message that they sent to the master was not only historically untrue, but it was designedly false. On the statement of fact, Dodge, J., said, p. 436:

> "This statement meant, as is not disputed, and it was understood by the master to mean, that war had actually broken out between Germany and each of the other countries named. Neither at the time it was sent nor at the time it was received, was the statement true as to either of said countries. Not only had no war been declared between Germany and any of them, but no actual state of war existed between Germany and any one of them."

The code that they had given to the master contained words that would have enabled the owners to describe the political situation exactly. The very first word in the private code in German is "Armin", and this means "war threatens with". *Polack*, fol. 1072.

Separate words then follow to indicate England, France and Russia, respectively. There were also words to indicate England and France, France and Russia, as well as England, France and Russia. *Polack*, fol. 1073.

Thus, the German owners could have telegraphed that war threatened with England, or France, or Russia or with all three, or with two of them. *Polack*, fol. 1074.

Indeed, the code is so comprehensive that the German owners might have cabled that war had broken out with France and Russia and was threatening with England, or that England was doubtful.

The statement by the German owners which is in the record gives a curious but illuminating explanation of their state of mind when they sent the message.

They considered, first, that war could be expected within twenty-four hours, *Stipulation*, fol. 1419, and, second, that any statement of the situation as it actually existed "was inadvisable and could only lead to misunderstanding and unsafe resolutions". *Stipulation*, fol. 1420.

In their opinion, only the false information that war had already broken out would lead the master "to observe in the further guidance of the vessel the deportment and care which were considered absolutely necessary here just as if the war had actually broken out here". *Stipulation*, fols. 1420, 1421. Further they said:

> "The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code". *Stipulation*, fol. 1423.

Slight comment need be made on the mental attitude of these German owners.

They could not trust the master of the steamer to act in accordance with their wishes if they told him the truth; therefore, in order that there should not be any possibility of his varying from their instructions, they purposely told him what was false.

This state of the record amply supports the conclusion of Bingham, J., as follows:

> "If, however, it could properly be found that the master acted upon the information contained in the telegram, exercised his discretion and determined to return to America, the claimant cannot avail itself of his decision as a defense to these actions. The information which the managing directors gave was false. War had not broken out, but it was purposely stated that it had to control the exercise of the

> master's discretion, if he wished to exercise it and did not at once follow their peremptory order. To permit the claimant to avail itself of the master's decision obtained under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud. That such was the purpose of the managing directors in sending the telegram is plainly deducible from the evidence presented by the record."

We do not concede that even if there had been an honest exercise of discretion by the master it would have afforded to the owners a defense to these suits.

On the contrary, we contend that the master was without authority or discretion to vary the voyage specified in the contracts which the owners had made as a common carrier in the face of known risk of the outbreak of war, and under which the owners had undertaken to carry the cargo, subject only to the exceptions contained in the bill of lading.

The master did not have any general discretion vested in him by law to deviate from the voyage contracted for, except under the compulsion of necessity to avoid an excepted peril, imminent, pressing and which had begun to operate.

Such a discretion as might have arisen, in face of such a peril, could only have been exercised in such manner as tended to promote the success of the voyage so far as possible and not to defeat it.

As Mr. Justice Bailhache said of an exception of Kings' enemies in a bill of lading in *Morrison* v. *Shaw S. & A. Co., Ltd.*, 1916, 1 K. B. 747, 758:

> "Those exceptions apply and apply only to a carrier who is performing his contract and never to a

> carrier who is breaking it unless he can show that the loss or damage must have occurred in any event."

The claimant does not make even the pretense in this case that the false message and order that were sent to the master tended to the performance of the contract. The claimant's entire case is an attempt to establish an excuse from paying for the damages resulting from the breaking of the contract.

An unusual course taken by the master as the best means of performing the contract perhaps might be justified, where it would not be if the performance of the contract was not the inducing cause.

The turning back of the ship here was merely a prudential step ordered by the ship owners exclusively for the protection of their own property, which they desired to keep out of the reach of any future peril that might arise if war should have broken out before the conclusion of the voyage.

b. The answer to the second defense, based on the exception in the bill of lading of restraint of princes, is that in fact no restraint of princes ever did exist.

At the utmost all that could be said of the situation was that the German owners anticipated that war might break out before the steamer should arrive at Bremen and if it should break out they did not purpose to have their vessel run any risk of danger if they could avoid it.

There is not any rule of law that would justify a ship owner in violating his obligations as a common carrier merely because of a fear that at some future date a condition of affairs might arise which might subject his vessel to a possible danger.

The allegation in the claimant's answer is that the bill of lading provided that neither the steamer nor carrier should be liable for loss or damage occasioned by arrest and restraint of people, and "that if the libelant has in fact sustained any damage the same was occasioned solely by the cause so excepted". Fol. 55.

The claimant did not set up in its answer any facts which it claimed constituted an arrest and restraint, or even a moral certainty of an arrest and restraint. Such facts could not have been alleged, because they did not exist.

The claimant does allege, however, in its answer that the shipment of gold was not only covered by the terms of the bill of lading, but was

> "Subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak or threatened outbreak of an European war."

We think that this allegation is incorrect, whether it be considered as a statement of fact or a conclusion of law.

Neither the outbreak nor the threatened outbreak of an European war that might prevent the vessel from completing her voyage would be an excuse to the carrier for its failure to perform its contract, unless the circumstances were brought within the exceptions in the bill of lading.

The *Kronprinzessin Cecilie* had been employed for years in trading between New York and Plymouth, Cherbourg and Bremerhaven, carrying passengers and cargo for hire for all who offered. She had always been

used as a commercial vessel, and was held out to the public as such. Polack, 1156-1158.

Accordingly she was a common carrier, and was under all the liabilities of a common carrier, except as they might be modified by the contract of carriage. Except as so modified, the liability of a common carrier is that of an insurer. *Liverpool Steam Co.* v. *Phoenix Insurance Co.*, 129 U. S. 397, 437.

Turning back on a voyage or making any substantial departure from the normal course of it, unless necessary to avoid practically certain arrest and restraint, constitutes a deviation; and a deviation deprives a common carrier of the protection that would otherwise be afforded to him by the exceptions of a special contract, and makes him an insurer against all losses.

This is the result of a long line of decisions, of which perhaps the most recent is *Morrison* v. *Shaw S. & A. Co., Ltd.*, 1916, 1 K. B. 747. There the ship was engaged on a voyage with cargo between New Zealand and London, with an exception in the bill of lading of King's enemies, and with liberty on the way to London to call at an intermediate port. She headed for Havre, an intermediate port on the way to London but not on the direct route, and was torpedoed by a German submarine and sunk with her cargo. The Court held that the ship owners had deviated in going toward Havre, and in consequence the exception of King's enemies in the bill of lading did not avail.

The claimant, however, seeks to obtain the benefit of the exception and restraint of princes by suggesting a rule never known in the law, as follows:

> "A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct course and taking such steps as a prudent man would take for the purpose of avoiding danger * * *"

This suggestion is made at page 55 of the petitioner's brief.

The very use of terms in this suggested rule prevents it from affording any protection in this case.

There was not any imminent peril, nor was there any existing danger, nor is there a word in the record, either in the testimony of the master or of the German shipowners to indicate that any one of them thought that there was any existing danger or imminent peril.

The directors have stated in their testimony that they had obtained information that a decree of a state of war for the German Empire would soon be issued and they expected that within twenty-four hours thereafter war would break out, fol. 1419, "alone can be designated as the decisive fact inducing us to recall the *Cecilie*." Fol. 1404.

Their claim in effect is that they apprehended that war involving Germany directly would break out sometime on August 1, and if it did, England or France or both would be immediately involved. If they should be, the *Kronprinzessin Cecilie* would run a risk of capture if she then should be less than two days steaming from Plymouth, as she would be if she were permitted to continue her voyage.

This proposition represents an accumulation of inferences on inferences. The inferences, however, are not legitimate; they were drawn not from established facts, but only from possibilities and conjectures.

These circumstances were very far from constituting an arrest and restrain within the language of the exception in the bill of lading.

We contend that nothing short of an actual physical arrest of the steamer or the moral certainty of such an arrest if she had proceeded on her voyage to Plymouth would have brought into force the clause in the bill of lading of "arrest and restraint".

Furthermore, the record shows with a reasonable degree of certainty that the steamer could have delivered her cargo at Plymouth and at Cherbourg and safely reached her home port of Bremerhaven without running any danger of an actual arrest or restraint.

German vessels were permitted to leave English ports so late as August 4, the very day when at 11 p.m., war was declared between England and Germany.

The *Kronprinzessin Cecilie* would in all probability, according to the table of her past performances, *Libelant's Exhibit* 6, p. 296, have arrived at Bremen at about 6 a.m. on August 4, or seventeen hours before England declared war.

As the declaration of war between France and Germany was of 6:45 p.m. on August 3, and the steamer would, according to past performances, have left Cherbourg about 8 a.m., she would have had eleven clear hours of sailing from Cherbourg before war was declared.

These facts are found by Dodge, J. He says:

> "Unless something had happened to delay the ship such as is not shown to have ever happened on any of her numerous prior voyages to the same ports, the specie to be delivered at Plymouth would probably have been delivered there by 1 A.M. on August 3, 1914, and that for delivery at Cherbourg by 8 A.M.

on the same day. * * * Nor is any reason shown for apprehending capture on the way from Plymouth to Cherbourg and thence to Bremen. * * *

So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture and detention on July 31, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose. The carrier's abandonment of the voyage deprived the shippers of the specie of all chance of having it so delivered. Thereby the carrier took the risk that the actual course of events might fail, as it did, to show actual and immediate danger threatening the ship either at the time or before she could have made delivery."

The conclusion is drawn by Dodge, J:

"That the arrest or restraint which will excuse failure to make the delivery undertaken by a contract of affreightment, unqualified except as in these bills of lading, must be an actual and operative restraint, and that no merely expected and contingent restraint affords sufficient excuse, has been settled law, at least since *Atkinson* v. *Ritchie*, 10 East 530."

The conclusions of Bingham, J., are similar.

We do not quote extensively from either of the opinions of the majority of the Court. It will be found, however, that they illuminate the whole field of controversy, and fortify by a careful consideration of the authorities the conclusion that neither the facts nor the law can assist the claimant here.

Two other features only will be considered.

The petitioner lays stress on the fact that on the 1st of August, at 9:40 P.M., about 24 hours after the steamer

had abandoned her voyage and turned back toward the United States, the master of the steamer picked up a wireless message that had been sent from Sayville in the United States, to the effect that the German Admiralty staff had sent out a wireless message addressed to German ships, which read, "Threatening danger of war. Do not touch at port England France Russia". *Record*, fols. 1030-1033.

The petitioner does not actually make the contention that this message constituted a restraint, but says at page 50 of its brief that the message "raises the important question as to whether the order in itself does not constitute a restraint".

The suggestion by the petitioner is the merest afterthought. The fact of the receipt of the message was never pleaded, but apparently was developed by chance during the examination of the master.

If the steamer had proceeded on her voyage on July 31, she would by 9:45 p. m. on August 1 have been more than one thousand miles distant from the United States than was her actual position, in view of her return toward America.

It is altogether improbable that under those circumstances, she ever would have received the message. She never did, in fact, get, until August 2 at 11 p.m., a confirmation from the owners of the message that they had sent on July 31. This confirmation also came by way of Sayville.

Furthermore, there is not any evidence in the record to indicate what, if any, action the master would have taken if he had proceeded on his voyage until August 1 at 9:40 p.m., and then had picked up the message which had been sent out by the German Admiralty.

The only other matter to be discussed is the contention by the petitioner that the decision of this court in the case of the *Styria,* 1902, 186 U. S. 1, announced any rule of law that would afford any justification to the shipowners for their breach of contract in this case.

There were very marked differences between the *Styria* and the present case.

In the *Styria* in addition to the clause in the bill of lading of restraint of princes there was the clause:

> "In case of blockade or interdict of the port of discharge or if without such blockade or interdict the master shall consider it unsafe for any reason to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe."

The vessel arrived at Sicilian ports on April 21, 1898, and after loading some cargo learned that war had broken out between Spain and the United States. The master then discharged and warehoused the cargo and notified the shipper that he did it "on finding risky my passage to New York with the actual sulphur cargo for facts of war."

The master considered it unsafe to attempt to go to the port of discharge owing to the fact that his course would have taken him within a few miles of the Spanish Coast and past the Spanish Naval base.

Both the District Court and the Circuit Court of Appeals considered the rights and liabilities of the parties to depend solely on the exceptions in the bill of lading.

In this court as in the other courts, the question at issue was whether under the exceptions in the bills of lading the master was justified in discharging the sulphur and failing to bring it forward.

This court decided that the facts in the *Styria* constituted a restraint of princes and that the master was protected under the bill of lading in discharging his cargo.

This was all that the case decided and all that the facts required for decision. There was an actual state of war, and the risk of capture if the master proceeded on his voyage with the contraband cargo was imminent and operative.

None of these circumstances confronted the *Kronprinzessin Cecilie*.

IV.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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CHARLES R. HICKOX,
EDWARD E. BLODGETT,
Counsel for Guaranty Trust Company of New York.

JAMES M. BECK,
CARL A. MEAD,
Counsel for National City Bank of New York.

Dated, New York, February 28, 1917.

FILED
FEB 6 1917
JAMES D. MAHER
CLERK

No. 922

Supreme Court of the United States

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, CLAIMANT OF STEAMSHIP KRONPRINZESSIN CECILIE,

Petitioner,

AGAINST

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

AGAINST

NATIONAL CITY BANK OF NEW YORK,

Respondent.

Petition for Writ of Certiorari, and Brief in Support of Petition.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioner.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

HIGGINS & HIGGINS INC. PRINTERS, NEW YORK

Supreme Court of the United States

OCTOBER TERM, 1916.

NORTH GERMAN LLOYD, Claimant of STEAMSHIP KRONPRINZESSIN CECILIE,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

SAME CLAIMANT,

Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,

Respondent.

Sirs:

Please take notice that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, and the annexed brief in support thereof, will be submitted to the Supreme Court of the United States at the opening of court on the 5th day of March,

1917, or as soon thereafter as counsel can be heard.

Dated, February 5th, 1917.

JOSEPH LAROCQUE,
WALTER C. NOYES,
JOSEPH D. BEDLE,
Counsel for Petitioner.

CHOATE, LAROCQUE & MITCHELL,
Proctors for Claimant.

To:

MESSRS. KIRLIN, WOOLSEY & HICKOX,
Proctors for Guaranty Trust Co. of N. Y.

MESSRS. SHEARMAN & STERLING,
Proctors for National City Bank of N. Y.

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GUARANTY TRUST COMPANY OF NEW YORK,

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SAME CLAIMANT,

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NATIONAL CITY BANK OF NEW YORK,

Respondent.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, North German Lloyd, claimant of the Steamship *Kronprinzessin Cecilie*, respectfully represents:

The respondent, Guaranty Trust Company of New York, filed its libel against the Steamship *Kronprinzessin Cecilie*, belonging to the petitioner, North German Lloyd, seeking to recover $1,793,278.22 damages for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold from New York to Plymouth, England. The respondent, National City Bank of New York, also filed its libel against said steamship seeking to recover $404,150.06 for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold to Plymouth, and $32,007.43 for an alleged breach of contract in failing to carry another consignment of gold from said port of New York to Cherbourg, France. By amendment to its libel the claim of the Bank was subsequently increased to $446,828.47.

The petitioner, as claimant, filed an answer to each of these libels (pp. 7, 116, 143) and the cases were tried together (with two other cases brought by passengers, which are not now in question) before the District Court for the District of Massachusetts, which entered decrees dismissing the libels.

Both libellants appealed to the United States Circuit Court of Appeals for the First Circuit which, by a divided court, reversed the decisions of the District Court and remanded the cases, with directions to enter an interlocutory decree for the libellants. The opinions of Judge Hale dismissing the libels are printed in the record (pp. 368-401; 402) and also appears in 228 Fed. Rep., 946. The opinion of Judge Dodge, the concurring opinion of Judge Bingham and the dissenting opinion of Judge Putnam are also printed in the record (pp. 435, 447, 459).

Facts.

Substantially all the facts are covered by stipulations which appear in the record (pp. 163-220; 310-315; 346-357).

The material facts are stated in the opinion of Judge Hale and such statement is accepted in the opinion of Judge Dodge and in the dissenting opinion of Judge Putnam. They are also examined and discussed in the brief accompanying this petition. Consequently, it is desirable here to do no more than to make the briefest possible summary in order to bring out the questions involved and the reasons why it is thought a writ of certiorari should issue.

On June 23, 1914, Archduke Francis Ferdinand of Austria and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia, and on July 23rd, Austria sent an ultimatum to Servia, subsequent to which date various political events took place in Europe, most of which are referred to in the diplomatic correspondence between the governments which later became involved in the war (Stipulation, p. 173 et seq.). These events were discussed at length in the American newspapers and were the subject of great public interest in this country.

On July 27, 1914, the Guaranty Trust Company shipped on the *Cecilie* 93 kegs of gold bars of the agreed value of $4,942,936.64, to be carried from New York to Plymouth, England, and thence to be forwarded at the steamer's expense but at owner's risk to London, unto Guaranty Trust Company of New York or its assigns (Stipulation, p. 164).

The National City Bank also shipped on said steamship 21 kegs of gold of the agreed value of

$1,061,718.89 to be carried to Plymouth, England, thence to be forwarded at steamer's expense but at owner's risk to London and delivered to London City & Midland Bank, Ltd., or its assigns, and at the same time the Bank shipped 40 kegs of gold of the agreed value of $2,104,254.34 to be carried to Cherbourg, France, and thence to be forwarded at steamer's expense but at owner's risk to Paris, and there delivered to Credit Lyonnais or its assigns (Stipulation, pp. 311-312).

The bills of lading issued for these shipments contained a number of stipulations, among them being an exception against loss or damage occasioned by "arrest and restraint of princes, rulers or people".

At the time of shipment the European situation was serious, but the prevailing opinion was that the diplomats of the respective powers would succeed in arriving at a satisfactory understanding.

The *Cecilie* sailed early in the morning of July 28, 1914, and continued on her voyage until the night of July 31, 1914, when at about 10 o'clock her master received a wireless message from the managing directors of the North German Lloyd at Bremen, reading: "War has broken out with England, France and Russia. Return to New York". She was then about 1070 nautical miles from Plymouth and would have arrived at that port, in ordinary course, early in the morning of August 3rd (Stipulation, pp. 164-165-166, fols. 656-662). Shortly after the receipt of this message the *Cecilie* turned back on her course and proceeded in a westerly direction (Record, fol. 658). On the next day, August 1st, the master of the *Cecilie* received another wireless message, which had been sent out by the German Government in the Government Code, reading: "Threat-

ening danger of war, do not touch at any port England, France, Russia, Reichsmarineamt." (literally, "Imperial Marine Office" (Record, fol. 1031), The *Cecilie* continued her westerly voyage, but instead of putting into New York, on account of supposed danger from British cruisers, changed her course to Bar Harbor, Maine, where she arrived August 4, 1914. A few days thereafter both libellants accepted redelivery of their gold.

War had not actually been declared between Germany and England, France and Russia when the directors of the North German Lloyd dispatched the wireless message to the master of the *Cecilie*. A decree of threatening danger of war (Kriegsgefahr) had, however, been proclaimed at that time and a general warning had been issued to the German Merchant Marine Service through the admiralty staff, and the directors had received authoritative information that a proclamation of the existence of a state of war (Kriegzustandes) had been perfected and would immediately be published* (Stipulations, p. 165, fol. 660; p. 350, fol. 1400). In addition to this they had received authentic information that the Imperial Government was about to dispatch on that day ultimata to France and Russia (p. 165, fol. 660; p. 192, fol. 765; p. 193, fol. 769). The directors knew that the breaking out of war with all the countries named was imminent. Their reasons for sending out the message and for using the phraseology employed are stated in the stipulations (pp. 348-352; 355-6, fols. 1418-23).

*The form of this decree was as follows: "We, William, by the Grace of God, German Emperor, King of Prussia, etc., decree by virtue of Art. 68 of the Constitution of the German Empire, in the name of the Empire, the following the Imperial territory, with the exception of the Royal Bavarian territory, is hereby declared to be in a state of war. This decree goes into effect with its publication."

Furthermore the record shows that on July 30th and 31st, 1914, 23 ships of the North German Lloyd, and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought or remained in neutral ports; that no German steamers left Hamburg or Bremerhaven for any foreign port after August 1, 1914, and that the last English bound steamers of the Argo Company which left Bremerhaven on July 30th, for London and Hull, upon instructions from their company returned to Bremerhaven August 1st without having discharged (Stipulations, p. 352, fol. 1408; p. 354; p. 357, fol. 1426).

The following are some of the more important events, known to the directors, which occurred subsequent to the time of sailing and prior to the time when the *Cecilie* turned back: Austria declared war on Servia (July 28); France informed Germany that she would act in harmony with her allies (July 29); Germany informed Russia of her intention to mobilize (July 29); Germany broke communications with France and concentrated troops on the French border (July 31); German Emperor issued a proclamation declaring a state of war (July 31); Austria decreed general mobilization (July 31); German Ambassador made demands upon French Government for a declaration, within eighteen hours, as to whether France would remain neutral in case of Russo-German war (July 31); German Ambassador at St. Petersburg announced to the Russian Foreign Secretary that, if within twelve hours Russia had not begun to demobilize, not only against Germany, but also against Austria, the German Gov-

ernment would be compelled to give the order for mobilization.

Information as to some of the above events and others not enumerated above was received by the master of the *Cecilie* by wireless.

The following are among the important events which occurred after the *Cecilie* turned back: Order for general mobilization of German army (August 1); British ships detained by German authorities (August 1); General mobilization of French army (August 1); Germany declared war on Russia (August 1) (Germany's declaration of war on Russia was, on account of treaty relations equivalent to a declaration of war against France also*); Luxemburg and French territory invaded (August 2); State of war declared to exist between France and Germany (August 3); England declared war on Germany (August 4).

Outline of Leading Questions in Case.

The District Judge ruled that upon the information which the captain of the *Cecilie* had received and the facts within his knowledge he had a reasonable apprehension of impending danger and was justified in turning his ship back and in so doing acted with due regard to the safety of the ship, passengers and cargo. Judge HALE placed his decision not upon the exceptions in the bill of lading but upon general principles of maritime law approved in the case of the *Styria*, 186 U. S., 1.

*On July 26, 1914, the German Ambassador at St. Petersburg was directed to make the following declaration to the Russian Government: "Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France * * * " (Stipulation, p. 177.)

Judge DODGE of the Circuit Court of Appeals held that the case did not come within the exceptions in the bill of lading and disposed of the position taken by Judge HALE by holding that the master of the *Cecilie* exercised no judgment or discretion because he received an order from the owner of the ship. *But the learned judge fails to notice in his opinion that the master in the Styria case as well as the master in Nobel's Explosives Co. v. Jenkins, L. R., 1896, 2 Q. B., 326 (referred to at length by this Court in the Styria case) received just as peremptory orders as the master of the Cecilie received in this case.*

Judge BINGHAM of the Circuit Court of Appeals also insists in his opinion that the master exercised no discretion because he received an order from the owners. But this judge ignores entirely the *Styria* decision in this connection.

The language of the *Styria* decision, which the Circuit judges disregarded, is printed in the accompanying brief. In substance this Court said that the master of the ship represented all interests, and exercised his judgment in not sailing with the cargo, notwithstanding instructions from the ship's agents, adding that "all that can be said is that there was a concurrence of judgment between the ship's agents and the master as to what was the proper course to pursue".

In this case the record shows conclusively and there is no question that the master was proceeding cautiously, making inquiries as to conditions, and that from the information he received he knew that the war situation was growing graver and that actual war was imminent. He was also keeping close track of his coal supply which was growing short if there were necessity for turning back. He was looking for messages and had conferences

with his officers as to the course to pursue. When he received the wireless message from his owners it was his judgment, in view of the whole situation, that the only proper thing to do was to turn back and he did so. The wisdom of his course is confirmed by the message from the Imperial Marine Office which he received on the following day. This message is not referred to by either Judge DODGE or Judge BINGHAM. What occurred was just like that which took place in the *Styria* case. The judgment of the master concurred with that of the owner.

And it is manifest that upon the facts presented to the master there was no other course to take. If war had broken out with France, Russia and England to go on meant certain capture. If the master had obtained the facts stated in the directors' message from any other credible source there can be no question but that his action in turning back would have been justified. It follows then that if the action of the master be not justified it is because of the owner's message. In other words, the claim is made and is supported particularly by the opinion of Judge BINGHAM that if the statements in the owner's message were not true the claimant cannot set up the exercise of the master's judgment as a defense. Judge BINGHAM thinks that to permit such a defense would be equivalent to permitting a person to take advantage of his own fraud.

The message was in no respect fraudulent. It was a private message from owner to master. Third persons could not have been and were not misled. The owners were acting in days of stress and anxiety. If they had stated merely that a state of war had been proclaimed, this would have been incomprehensible to the captain who was not

familiar with the regulations of political law. Only the information that war had broken out could show him the political situation in the same degree of distinctness and clearness with which the directors viewed it at Bremen, and only such information would indicate to him in the guidance of his vessel the deportment and care which the situation required. The directors were bound to assume that owing to congestion of the wireless facilities a long period would elapse before the receipt of their message, during which time there would be a further aggravation of the situation and they knew that when a formal declaration of war was made all further communication with their ship would be cut off on account of the isolation or interruption of the telegraphic connections (Stipulation, pp. 355-356, fols 1420-1422.)

The test as to whether the owners are to be barred by the form of their message from setting up the master's judgment in concurrence with their own as a defense must be this: If the directors could have included in their message a statement of all the political events which had occurred down to the time of its dispatch, would a prudent master have been justified in turning back? The owners cannot be estopped by what they said if the whole and exact truth would have produced the same result. And we submit that had these owners been able to incorporate in their wireless message all the facts known to them showing the critical state of affairs and the actual existence of a "state of war" the only possible course for Capt. Polack to have taken would have been to turn back exactly as he did. Otherwise he would have run into the teeth of danger and

exhausted his coal supply. He could not have gone on awaiting developments and then turned back.

Looking at the case from another point of view the same result is reached. We insist upon the authority of *The Styria* that the master represented all interests and that instructions from the owners regarding the ship did not change his obligations. But if this position be wrong and the act of the owner be, on account of modern conditions of communication, substituted for that of the master, then the responsibility of the owner must carry with it the corresponding right and the question then is, not whether the facts stated in the owner's message were literally true, but whether the instructions were justified. And here we claim that the facts disclosed in the record and discussed in our brief fully justify such instructions and that reasonable prudence, bearing in mind all interests, required the ship to turn back before it was too late. Indeed it is our contention upon such facts that the directors of the North German Lloyd were not only justified in sending out their message but that it was their duty to send it. And the performance of such a duty cannot create a liability.

Another most important point is also overlooked entirely in the opinions of the Circuit Judges. If the *Cecilie* had not turned back on the night of July 31st, she would necessarily have turned back the next day, August 1st, when the German Imperial Marine Office (Reichsmarineamt) sent the message already referred to, directing ships not to touch at any English, French or Russian port. Surely, the master, as a prudent man, could not have ignored this message and if he had followed it the same situation would have

existed except that on account of the small coal supply the ship might have had more difficulty in reaching the United States.

This subject is fully discussed in our brief, which raises the additional question as to whether the government order did not, in itself, create a "restraint" within the meaning of the bills of lading.

The majority opinions further hold that the case did not come within the exception "arrest and restraint of princes" in the bill of lading. In this we think there was error and that the defense based upon such exception ought to have been sustained. A reasonable apprehension that war will break out and result in capture before a ship can reach her destination is as much a restraint as such an apprehension after the actual outbreak of hostilities. Indeed, in these days of submarines and wireless telegraphy as well as steam, there might be more danger in approaching the port of a country with which war is imminent than, in earlier days, in going directly into enemy waters after the outbreak of hostilities.

We respectfully submit that the rule stated by Judge Dodge is too refined and technical; that this master was not required by the bill of lading to risk the capture of his ship, passengers crew and a valuable part of his cargo, by proceeding deliberately into danger.

The learned judge also confused certain principles involved in the law of marine insurance with those properly applicable to bills of lading and failed to recognize the real and substantial distinction between a restraint which justifies a claim for a constructive total loss and one which will justify a master in safeguarding the interests he represents.

In holding that there must be an existing and operating restraint to justify the master in turning back and that as war had not actually been declared such a justification cannot be found in the present case, the learned judge ignores the duty which rests upon a master to use all reasonable precautions to avoid a loss, even from a danger which is expressly excepted in the bill of lading.

Special Reasons for Allowance of Writ.

1. The decision of the Circuit Court of Appeals is not only in direct conflict with the decision of this Court in said case of *The Styria* (186 U. S., 1) but ~~are~~, we respectfully submit, contrary to principles established in other leading cases and to fundamental rules of maritime law.

2. The questions arising in the present cases are of both national and international importance in the following particulars:

(a) A great number of vessels are in a situation similar to that of the *Cecilie*.

(b) The amount involved directly and incidentally is very large.

(c) The decisions affect all vessels of the German Mercantile Marine over which or over whose owners the United States courts have or may obtain jurisdiction.

(d) Changes in the means of communication between owners on shore and their masters at sea, due to the invention of wireless telegraphy and the like, render it desirable that their rights and obligations as between themselves and as between them and the public should be fixed by the highest court.

(e) The effect of the order of the German Imperial Marine Office sent out to all German ships is a matter of sufficient importance to require a determination by this court.

(f) The rules governing the rights and duties of foreign ships when their nations are in, or verging upon, a state of war are of national and international importance.

(g) The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.

(h) Equal division of federal judges renders it important that these cases should finally be disposed of by this Court. This is particularly true, we submit, under the conditions which have arisen just as we are preparing this petition. Diplomatic relations with Germany have been broken. What the situation will be when this petition is presented to the Court no one can tell. But in any event we feel that this Court will agree with us that such very important cases affecting the rights of German subjects and creating such a precedent should be considered by this Court rather than be left to stand upon the decree of a divided lower court; so that no one will have ground for feeling that he has been denied due judicial consideration.

It is respectfully submitted that this application should be granted at the present time for the following reasons:

(a) If the application were postponed until after the entry of a final decree, much time would be consumed and expense incurred in taking proof of damages before a commissioner. Many other claims of great magnitude are dependent upon

the determination of the principles of liability involved in these cases, and if, this court should hold that the *Cecilie* is not liable, the principle of liability will be determined for all other German ships in a like situation.

(b) The damages claimed by the libellants in these cases are so large in amount and speculative in character that it is impossible for the claimant to file a bond and thus release its ship. Indeed under existing conditions it would be absolutely impossible to give a bond, and if the libellants should undertake—as they might—to have the *Cecilie* sold, vast and irreparable damage might be done to the claimant before it would have opportunity to apply again for a writ of certiorari.

(c) The case is peculiarly one where a prompt decision is essential to the protection of the rights of the claimant.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit commanding the said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the case therein entitled Guaranty Trust Company of New York, libellant-appellant, v. Steamship *Kronprinzessin Cecilie*, North German Lloyd, claimant-appellee, No. 1196, and in the case therein entitled National City Bank of New York v. Same, No. 1199, October Term, 1916, and to the end that the said causes may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

State of New York, }
County of New York, } ss.:

Charles von Helmolt, being duly sworn, deposes and says that he is a member of the firm of Oelrichs & Co., General Agents in the United States of the North German Lloyd, the petitioner above named, and that the matters stated in the foregoing petition are true to the best of his knowledge, information and belief.

CHARLES VON HELMOLT.

Sworn to before me this
5th day of February, 1917.
Frederick Nordenholt,
Notary Public,
New York County.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in our opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

Joseph Larocque,
Walter C. Noyes,
Joseph D. Bedle.

BRIEF IN SUPPORT OF PETITION.

Substantially all the facts have been stipulated by the parties and there is no question of fact involved in the case (Stipulations, pp. 163-220; 310-315; 346-357).

The material facts are stated in the opinion of Judge Hale, and such statement is accepted in the opinion of Judge Dodge and the dissenting opinion of Judge Putnam (pp. 435, 459).

There are novel, interesting and important questions of law raised in the cases, upon which questions there is an even division between the four judges who have passed upon them.

STATEMENT OF THE CASES.

The North German Lloyd steamship "*Kronprinzessin Cecilie*" was built in the year 1907 at a cost of about $4,500,000. On July 27, 1914, she was lying in the port of New York and on that day received on board consignments of gold and silver bullion of the total value of more than $11,000,000 to be carried to Plymouth, England, and Cherbourg, France.

The Guaranty Trust Company of New York shipped 93 kegs of gold bullion of the value of $4,942,936.64 to be carried to Plymouth, and thence to be forwarded to London and there delivered in like good order and condition unto the order of the libelant in consideration of $9,268 prepaid freight (Stipulation, p. 164, fols. 653).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the Trust Company the sum of $1,544.67, the pro-

portion of the prepaid freight covering the inland transportation of said Trust Company's gold from Plymouth to London (Stipulation, p. 167, fols. 666-7).

The National City Bank of New York shipped 21 kegs of gold bullion of the value of $1,061,718.89 to be carried to Plymouth and thence to be forwarded to London and there delivered unto the London City & Midland Bank, Ltd., in consideration of $1,990.72 prepaid freight, and 40 kegs of gold bullion of the value of $2,104,254.34 to be carried to Cherbourg, France, and thence to be forwarded to Paris and there delivered unto the Credit Lyonnais in consideration of $2,630.32 prepaid freight (Stipulation, p. 311).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the National City Bank of New York the sum of $331.79, the proportion of the prepaid freight covering the inland transportation of said Bank's gold from Plymouth to London, and the sum of $657.58, the proportion of the prepaid freight covering the inland transportation from Cherbourg to Paris (Stipulation, p. 314, fol. 1255).

Neither the Trust Company nor the Bank made any statement of the purpose for which its shipment was made, otherwise than as stated in the bill of lading, or of the disposition which it intended to make of its gold, and no notice of any special damages which might result from the failure of the steamship or of the claimant to perform its contract (Stipulation, p. 164, fol. 655; p. 312, fol. 1247).

The bills of lading were in the usual form containing, among other stipulations, an exception against liability occasioned by "arrest and restraint of princes, rulers or people" (Bills of

Lading, pp. 17, 129, 133), and there were other provisions or exceptions contained in them in favor of the shipowner, indicating that time was not regarded as of the essence of the contract.

The freight received by the claimant for these shipments was about one-eighth of one per cent of their value.

The ship carried a full complement of officers and crew amounting in all to 650 men. Altogether there were about 1892 persons on board comprising 354 Americans, 667 Germans, 406 Austrians, 3 Italians, 151 Russians, 7 French, 14 English, 1 Australian, 2 Belgians, 4 Spaniards, 2 Swiss, 3 Cubans, 8 Bulgars, 7 Serbs, 1 Roumanian, 1 Greek and 3 Hollanders, besides a large number of passengers of whose nationality there was no record at the time of the trial (pp. 302, 303).

These persons represented substantially all the nations which subsequently became involved in the war.

The steamer sailed early in the morning of July 28th and continued on her eastbound voyage until at about 10 P. M. on the night of July 31, 1914, when 1070 nautical miles from Plymouth, her first port of call, she received a wireless message from her directors at Bremen stating that war had broken out with England, France and Russia and advising that she put back to New York (Stipulation, pp. 164-165, fols. 656-660).

Captain Polack thereupon turned his ship and put back towards the United States. The following day he received a wireless message from the German Imperial Marine Office forbidding him to touch at any port of England, France or Russia (p. 259, fol. 1033).

When nearing New York, on account of supposed danger from British cruisers, Captain

Polack directed his course to Bar Harbor, Maine, where the ship arrived safely on August 4th, and all the gold and silver bullion was returned to the parties entitled thereto.

The directors of the North German Lloyd, before they dispatched their wireless message, knew of all the important political events which had transpired since the assassination of Archduke Ferdinand and his wife, and had received authoritative information from high governmental sources of the events immediately preceding active hostilities. Thus they had been informed of the proclamation of threatening danger of war for the German Empire and had received from the Imperial Admiralty Staff the general warning sent out to all ships of the German Mercantile Marine; they had been notified by Baron von Plettenberg, one of their number who had been sent to Berlin, that he had been informed by governmental officials that short time ultimata were to be sent at once to Russia and France and that an Imperial proclamation declaring the existence of a state of war had been perfected and would immediately be made public.

The Lloyd's nautical department had been constantly engaged in figuring the positions of their ships and their coal supplies and knew that a determination with respect to the *Cecilie* would have to be reached early in the afternoon of July 31st, for otherwise she would not have sufficient coal to return to the United States (fol. 1395). The correctness of their estimate is shown by the fact that when she finally reached Bar Harbor there remained in her bunkers only 450 tons, which was much less than a day's supply (fol. 997).

Before leaving New York Captain Polack, master of the *Cecilie*, had carefully read the Ameri-

can newspapers and had kept himself informed as to the progress of events (fol. 998). While on the voyage he received by wireless much additional information indicating that the political situation was becoming more acute, and, when in conference with his chief officer, expressed grave anxiety as to the situation and a desire to obtain information from the Home Office (fols. 914-939, 1039). When, on the night of July 31st, he received the message from his directors, the instructions given to return to New York coincided exactly with his own judgment and this course seemed to him to be the best and only thing to do in the circumstances (fols. 1039-1040).

That the return was fully justified is conclusively proved by the fact that on August 1st Captain Polack received from the Imperial Marine Office at Berlin a wireless message forbidding him to touch at any English, French or Russian ports (fols. 1026, 1031-3).

Judge Hale, before whom the case was tried in the District Court, made a careful examination of the evidence and decided that he (the master) "acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity". So far as the claimant's directors were concerned the learned judge held that they "acted with a reasonable apprehension of imminent peril, when they sent the wireless message to their captain," and that "the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril".

The learned judge arrived at this conclusion "without considering the terms of the bill of lading, for the reason that the master was justified

in his action by the duty imposed upon him under the maritime law" (fol. 1604). He accordingly dismissed the libels.

In referring to Captain Polack, Judge Hale said that he impressed him "as being a truthful man, and a faithful, trustworthy shipmaster. He showed a clear appreciation of the trust imposed in him".

Judge Dodge said that the master's testimony at the trial impressed him "as it did the District Court, with its apparent truthfulness".

Judge Putnam entertained the same views of the merits of the case as Judge Hale, in fact he regards the case as too clear to require argument or the citation of authorities, for he says (p. 465), "It is unnecessary to cite authorities on this topic, because the law is too well settled and the underlying principles are all too uniformly accepted, in the circumstances of this case, to the effect that it was not only the right but the duty for the master of this ship not to delay, and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture, and to have due regard to the uncertainties of the ocean, and leave reasonable margin for the state of weather and for accidental detentions; and under the circumstances of this case the decision to turn back was justifiable whether it came from the master or owners."

Judges Dodge and Bingham, constituting the majority of the Circuit Court of Appeals, differed from Judges Putnam and Hale and decided that the return of the Cecilie was unjustified and the ship liable in damages to the libellants, basing their decision, not upon broad principles of maritime law, but upon narrow and technical reason-

ing to the effect that Captain Polack acted under orders from his directors; that therefore the return of the ship to the United States cannot be justified as a reasonable exercise of the master's discretion; and that notwithstanding the fact that a declaration of threatening danger of war had been proclaimed and that a proclamation of the existence of a state of war had been perfected, the statement in the message that war had broken out was not literally true. Judge Bingham goes so far as to say that "to permit the claimant to avail itself of the master's decision obtained under such circumstances, would be the equivalent of according to one the protection of a judgment which he had procured through fraud".

The majority of the court hold in effect that the owner on shore has no general discretion as has the master on the ship, and that war not having actually been declared when the ship was turned, there was no arrest or restraint within the meaning of the exception in the bills of lading, *and that there could be no arrest or restraint before the existence of an actual state of war.*

POINTS.

I.

The decision of the Circuit Court of Appeals is in conflict with the Styria, 186 U. S., 1.

In the *Styria* case the facts were as follows:

The *Styria*, an Austrian steamship, sailing from Thieste *via* Sicilian ports to New York, took on

board at Port Empedocle, Sicily, a quantity of sulphur for New York. She reached Port Empedocle on April 21, 1898, and her master began at once to load on board the sulphur in question, and by April 24th it was all on board and bills of lading, excepting "restraints of prices and rulers, or people," had been signed, and the vessel cleared from the Custom House, and was ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York. In the meantime, unknown to the master, war had broken out between the United States and Spain, and on April 22nd, the first act of war, the capture of a Spanish merchant steamship, the Buena Ventura, was committed. On April 25, the Queen Regent of Spain issued a decree announcing the existence of war, and declaring sulphur, among other things, to be contraband.

On April 23, the master of the Styria received a telegram from Burrill & Sons, her managing agents in London, directing him not to sail until further orders; and on April 25, another telegram directing him, "to discharge whole cargo as quickly as possible," without assigning any reason for this order. The master had by this time learned that war existed, and that sulphur was contraband. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that sulphur was contraband, the master began to reland the sulphur at Port Empedocle on April 27, and had it all unloaded and warehoused by May 7th. On April 30th and May 2nd the shippers of the sulphur protested against the unloading.

The exportation of sulphur is one of the principal industries of Sicily and immediately after the declaration of war, Sicilian merchants urged

the Italian Government to request Spain to exempt it from the list of contraband. The representations of the Italian ambassador in Madrid, resulted in a declaration by the Spanish Government, that it would permit sulphur to pass free, and would advise its naval commanders to that effect. The negotiations between the Italian and the Spanish Governments were published in the Italian newspapers and it was also reported that the negotiations would be, and later that they had been, conducted to a successful termination.

On May 5-6, the Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, which read in part as follows: "*I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free.* (*Signed*) *The Minister, Coeco-Ortu.*"

These reports were read by the master of the Styria.

The sulphur was not wholly discharged until May 7th. In the meantime "a vessel which lay alongside the *Styria* at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19th. *Two other vessels laden with sulphur came safely from the Sicilian Port of Licata to the United States about the same time, and no ships were taken by Spain during the war*" (p. 7). The master, acting under the orders of the agents, which were in accordance with his own judgment, as he did not think the newspaper reports sufficiently "authentic", sailed without the sulphur.

The District Court held that the discharge of the cargo was too hasty and precipitate and not justified by the facts of the case.

On appeal to the Circuit Court of Appeals, it

was held that the sulphur was rightly discharged, but should have been re-loaded before the Styria left Port Empedocle.

The case having been brought to this Court by a writ of certiorari, it was held that the master was justified in landing and storing the cargo, and that it was not made his duty by the facts brought to his notice to re-ship the sulphur on the Styria and further delay the voyage.

The Circuit Court of Appeals has unsuccessfully attempted to distinguish the present cases from the *Styria* in three important particulars:

(a) In the present cases the majority of the Circuit Court of Appeals refuse to justify the return of the *Cecilie* as an exercise of her master's discretion, upon the ground that, having received from his owners an order to put back, he was deprived of all discretion. In this connection Judge Dodge says (p. 437):

> "The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back; and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained."

If this statement be correct, the owner must prove three facts:

1st. That circumstances actually existed which would justify the master in turning back.

2nd. That the master had full knowledge of all these circumstances when he turned back, and

3rd. That in turning back there was an "ac-

tual exercise" of such discretion by him "in view thereof".

It would not be sufficient for the owners to prove that when the ship turned back there had been an actual declaration of war between Germany and England, France and Russia, nor would proof of the additional fact that the master was fully informed of such declaration be sufficient unless they could show that in turning the ship the master acted entirely upon his own judgment and discretion, without any order or suggestion from the owners, who were on shore and in a position to have the best possible information as to actual conditions.

Later the learned judge says "the owner's direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. * * * By assuming to direct from Bremen, as it did, the course which the ship should take, her owner assumed, for itself and its ship, all such responsibility and lost all right to charge the master with any share thereof" (p. 438).

In this connection the majority of the Circuit Court of Appeals have ignored the fact that in the case of *The Styria*, and in the case of *Nobel's Explosives Co. v. Jenkins* (L. R. [1896] 2 Q. B., 326), approved in *The Styria* case, the masters acted under orders received from their owners which were just as peremptory as the order received by Captain Polack.

In *The Styria*, Mr. Justice Shiras, writing the opinion of this Court, referred (p. 11) to a suggestion that had been made by the District Judge and repeated in the argument for the libellants "to the effect that the master was guided in his action in discharging contraband cargo by the

telegram from Burrill & Sons, the managing agents in London rather than by his own judgment on all the circumstances known to him at the time". In disposing of this contention the learned justice says:

> "This does not appear to be supported by the testimony of the captain, which is the only evidence on the subject. It is true that he did state that he acted under instructions of the agent but he also said, in reply to questions put on cross-examination as follows:
>
> 'Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? Answer: Yes, and also because I knew that the war was there and I acted on the bill of lading clause. Question: You have testified, haven't you, that all this you did by orders? Answer: No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war.' "

Justice Shiras then proceeds as follows (p. 20):

> " 'Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with the contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judg-

ment, exercised apparently in good faith on their behalf.

In the case of *Nobel's Explosives Co. v. Jenkins*, just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the ship owners, if it were possible to get it before the emergency was over; and all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue.'"

In the present cases there were certain facts which made Captain Polack's position one of peculiar responsibility.

The *Cecilie* was one of the most valuable vessels afloat, having cost approximately $4,500,000, and carried 1892 persons of practically every nation which subsequently became involved in the war, principally Germans (pp. 302-303). A great number of these persons would be subject to arrest if war should break out while the ship was in Plymouth, Cherbourg or Bremerhaven.

The ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335 (pp. 10, 11, fols. 40, 41).

The sailing of the *Cecilie* with a large amount of gold bullion was contemporaneously published in the leading newspapers of America and Europe, and was given great notoriety throughout the world (p. 308, fol. 1233), and Captain Polack had reason to assume that enemies' vessels would keep a bright lookout for so rich a prize.

The situation required the exercise of greater caution than in the case of an ordinary merchant vessel.

Before sailing Captain Polack had kept in touch with the political situation and knew in a general way how events had been developing, and after leaving New York he received, from time to time, wireless messages informing him as to the progress of events.

These news items were published in the "Ocean Gazette" a newspaper printed on the *Cecilie* (Libellant's Ex. 3, pp. 232-4; Libellant's Ex. 2, pp. 229-31).

The news thus received indicated that the situation was becoming more and more acute.

On July 29th the Gazette published a wireless dispatch from London announcing the formal declaration of war by Austria against Servia and active hostilities between the two countries; the refusal of Germany and Austria to accept the proposal of Sir Edward Grey for a conference of ambassadors of the powers in London; the issuance of orders for the German fleet to concentrate in home waters and an announcement that the British fleet and second battle squadrons were in readiness for service; a dispatch from Berlin to the effect that the Russian forces had occupied positions near the frontier of Russian Poland and that a squadron of German cavalry had also advanced to the frontier; an announcement that Emperor Franz Josef had granted complete amnesty to all Austro-Hungarian subjects who had deserted from the army or who had emigrated to other lands to avoid military duty.

On July 31st, the Ocean Gazette published the following news items:

An ultimatum from Germany to Russia demanding an explanation for the latter's mobilization, the answer to be given within 24 hours; fighting between Austrian and Servian forces at several points; a report that the southern column of Aus-

trians in Bosnia was watching the Montenegrin troops, and that in a severe battle in Bosnia the Austrians had defeated the Servians, with many killed on each side; an announcement that the gravity of the international situation was recognized in all European capitals; that Russia was proceeding with her mobilization of a large number of troops while the French defensive forces were taking extensive precautions; that business was practically suspended on the London Stock Exchange pending the serious war situation and that dealers refused to make prices; that the consols had reached a record low price of 69½, the lowest in a century, and that seven failures were reported; that the St. Petersburg, Vienna, Budapest and Brussels Exchanges remained closed and that two failures had been announced on the Glasgow Exchange; a declaration by the Shimbum, a semi-official newspaper of Japan, that if England were attacked, Japan would give assistance to the British arms, and a dispatch from Washington to the effect that administration officials were awaiting additional developments in European politics, and that if nations other than Austria and Servia were drawn into the conflict, a proclamation of neutrality covering the entire situation would probably be determined upon by the State Department.

The news received during the eastbound voyage increased Captain Polack's anxiety. He discussed the matter with his chief officer on the night of July 30th and, as he expressed it, he was very anxious to "get news from home about the political situation and about this war". All the news he received indicated that the situation was rapidly becoming more critical so that when he received the message from his managing di-

rectors, whom he assumed to be well-informed, the course which appealed to his best judgment as the best one to pursue was to turn back to the United States and not run into any danger; that seemed to him the best and only course (p. 260).

The wisdom of this course was fully confirmed when on the following day he received the wireless message from the Imperial Marine Office.

In the cases at bar the master's judgment was based upon (a) the information he obtained before sailing; (b) the information he obtained on the voyage indicating the increasing gravity of the situation, and (c) the information acquired from his directors at Bremen, and later confirmed by that received from the German Imperial Marine Office.

All the facts pointed irresistibily to the conclusion that the return to the United States was the only safe course to pursue.

In the case of the *Styria* the master received a peremptory order from his owner's agents to leave the sulphur at Port Empedocle. While his earlier information was that sulphur had been declared contraband, he was later informed, through the publication of an official declaration from the Italian Minister of Agriculture, that the Spanish Government had agreed to let sulphur pass free. This later information he chose to ignore, not considering it sufficiently "authentic".

If Captain Polack had, in turning back, acted contrary to his own judgment, the question of justification might have arisen, but we confidently submit that in this respect the present cases are on all fours with the case of *The Styria*, and that in these cases, as in the *Styria* case, although the master received instructions from his owners,

there was a concurrence of judgment between them as to what was the proper course to pursue.

(b) The majority of the Circuit Court of Appeals hold that the return of the *Cecilie* was due to an apprehension of a non-existent future restraint, but that to justify the return there must be "an actual and operative restraint, and that no merely expectant and contingent restraint affords sufficient excuse" (Judge Dodge's Opinion, p. 442).

In so holding the majority of the court ignore the fact that in the *Styria* case there was no actual restraint or danger, either existing or *in futuro*, because the Spanish Government had agreed to permit sulphur to pass free, and during the Spanish-American war this permission was never rescinded.

(c) The majority of the Circuit Court of Appeals attempt to distinguish the present cases from the case of *The Styria* by reason of the fact that in the *Styria* case the bill of lading contained a stipulation that the ports of delivery should be safe (Judge Dodge's Opinion, p. 442), entirely ignoring the fact that in the *Styria* case this stipulation was immaterial and inoperative for the reason that the port of New York was the port of destination and it was not even suggested that this port was at any time unsafe. This court's decision in the *Styria* case did not in any way depend upon this stipulation in the bill of lading, but was upon broader principles of maritime law which should determine the present cases as well. This is also true of the English cases.

(d) The majority of the Circuit Court of Appeals hold in effect that to justify the return of

the *Cecilie* an actual state of war must have existed at the time when the deviation occurred, and that no authority exists in law for any other view.

His Honor, Judge Dodge, says (p. 444):

> "But no case is found in which, there being no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made."

This we submit is an erroneous statement of the law which if permitted to stand will cause great confusion.

In *The Teutonia*, L. R., 4 P. C., 171, approved by this court in the *Styria*, the master deviated from the port of Dunkirk, his port of destination, upon information that war had been declared between Prussia and France, *the fact being, however, that war had not been declared and was not in fact declared until three days after such deviation.*

II.

In the circumstances disclosed by the record, the North German Lloyd Directors were not only justified in sending out their wireless message, but it was their duty to do so. The performance of this duty cannot create a liability.

The causes which impelled the directors to dispatch the message to Captain Polack are fully set forth by them in a statement which is stipu-

lated into the record (pp. 348-352). As this statement is of vital importance, as showing justification for the recall of the *Cecilie*, we venture to reprint it in full.

> "Up to Wednesday, July 29th, the interpretation of the political situation, which, of course, was followed by us with the greatest attention, from the time of the ultimatum sent by Austria to Servia, and the conflict of interests resulting therefrom, between the powers interested directly or by alliance was essentially a quiet and optimistic one, on the part of the Board of Directors of the North German Lloyd, as up to that time a restricting of the conflict to the powers immediately interested therein, namely, Austria and Servia, was counted upon, and we did not believe as yet in the active participation of Russia and France on the one side, and Germany on the other.
>
> Accordingly, the Board of Directors did not as yet see any reason for any immediate decision in regard to the further movements of our ships.
>
> In this interpretation of the Board of Directors there occurred a decisive change on the evening of the day mentioned, July 29th, owing to the fact that Captain Bartling, the manager of our nautical department, returning from a trip to Berlin on matters concerning his department, brought with him information in regard to a very serious interpretation of the political situation of various governmental officers; according to which it was already being seriously considered there that the remaining European great powers could be drawn in the pending conflict, and that there could be a general European war.
>
> After the return of Captain Bartling, the members of the board of directors at Bremen held a meeting during the night to discuss the measures to be undertaken. They determined to delegate a member of the board of

directors to proceed to Berlin in order that he might make inquiry of government officers and obtain information in regard to the development of events. Baron von Plettenberg was chosen to proceed to Berlin and he started that night.

Special attention was paid by the Board of Directors to the Steamer *Kronprinzessin Cecilie*, after her departure from New York on Tuesday, July 28th, as this ship, owing to her route, had to appear endangered, in case of the breaking out of war, and also required our special attention, owing to the high value of the ship and the cargo.

Upon instructions of the Board of Directors, the Nautical Department figured out exactly what was the latest time that the vessel would have, to receive an order in regard to the continuation or interruption of her journey, and we reached the conclusion that according to the supply of coal on hand, and the duration of the trip in question, the Board of Directors would have to come to a decision in regard to this by latest during the early hours of the afternoon of Friday, July 31st.

In this connection it was also taken into consideration that owing to the great congestion of the cable and wireless connections, a longer period of transmission of our telegram would have to be figured with. A period of time which actually from the departure of our telegram, July 31st, 2:45 p. m. until its receipt on board of *Cecilie*, July 31st, 10:09 P. M. true time of place, even exceeded our expectations and actually resulted in the fact that the *Cecilie* could no longer return to New York in compliance with our order, but had to select the shorter route to Bar Harbor.

The mission of Baron von Plettenberg, who arrived in Berlin on July 30th, in the morning, did not bear any positive results on this first day, as he could not obtain any

decisive information and indications from the government offices visited by him, in regard to the probable further development of the political situation.

Accordingly our interpretation of the political situation was still a predominantly confident and hopeful one on this day, July 30th, and we allowed our steamer *Main* to leave Bremerhaven for Antwerp as scheduled.

However, on the evening of this day, July 30th, there was issued a general warning to the German Merchant Marine Service, through the Admiralty Staff. This warning, which became known to us the same evening, constituted the first official sign for us of the very serious interpretation of the political situation by the German government, and caused us, beginning with this period of time to begin sending the first telegraphic instructions for our vessels in regard to the further procedure of their trips.

On Friday, July 31st, shortly after 2 o'clock in the afternoon, we received from Baron von Plettenberg, the telegraphic information that he had learned from an authoritative source that the declaration of the state of war, 'Erklarung des Kriegszustandes fur das deutsche Reich wegen drohender Kriegsgefahr,' had been perfected, and would shortly be made public.

This 'declaration of the state of war for the German Empire, owing to the "threatening danger of war" ' was then, soon afterwards, at 4:16 in the afternoon, brought to our knowledge by a telegram of the Imperial Marine Office, and the respective Imperial decree was publicly proclaimed on the same afternoon at about 5 o'clock, in Bremen also.

On the basis of this telephonic advice from Baron von Plettenberg, the telegram was sent to Captain Polack immediately at 2:45, upon the resolution of the members of the Board of Directors assembled at Bremerhaven, recalling the *Cecilie* to New York.

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The decree of the state of war for the German Empire, as quoted above, communicated to us by Baron von Plettenberg, offered to the members of the Board of Directors who participated in this resolution, the immediate reason for the recall of the *Cecilie*.

Compared with this decree of a state of war, all other political advices and facts which he had at the time, as expressed in the newspaper material are only of secondary and minor importance of a commentary and explanation of this governmental decree, from which could be seen the causes and gradual developments of the conflict, and the enemies to be expected in case of the breaking out of the war, which however, in itself, and without the supplementary act of the government in declaring the state of war would not, as yet, have caused us to take immediate actions in regard to our vessels.

Therefore this decree of a state of war alone can be designated as the decisive fact inducing us to recall the *Cecilie*. * * *

Consequently the considerations which induced us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable."

The majority of the Circuit Court of Appeals hold that these facts did not justify the directors in recalling the *Cecilie*. Judge Bingham characterizes the information contained in the telegram as false and holds that "to permit the claimant to avail itself of the master's decision obtained under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud."

We submit that this characterization is unjust to the claimant and unwarranted by the facts.

The proclamation of threatening danger of war

followed by the Government warning to German shipowners, and the second proclamation of the existence of a state of war indicated in precise terms the danger to be apprehended, and although the declaration of a state of war did not in itself amount to a declaration of war against any power, it was fully understood by the North German Lloyd directors what governments were involved. In the circumstances the proclamation of the existence of a state of war, carrying with it a declaration of martial law, was equivalent to all intents and purposes to the outbreak of war, certainly so far as the future guidance of the North German Lloyd vessels was concerned.

In phrasing their wireless message as they did, there was no thought in the minds of the directors of deceiving any one, but they were concentrated upon conveying the most precise information to their captain of the seriousness of the situation, as they viewed it.

The directors' reasons for saying that war had broken out are expressed, in their own language, in their further statement which has been stipulated into the record (pp. 355-356):

> "The reason why we stated in our telegram to the *Cecilie* that the war had broken out, whereas, up to that time, as a matter of fact only the proclamation of a state of war, owing to the threatening danger of war had been issued, are the following:
>
> First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.
>
> Secondly, we stated ourselves, when sending off the telegram that every other information in regard to the political situation, every statement that was not absolutely

clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

The sole information that the state of war had been proclaimed would probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations of political law.

Only the information that war had already broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

Furthermore we had to count on quite a long period of transmission for our telegrams, during which time, therefore, a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code."

We submit that in turning the ship Captain Polack exercised a wise discretion for the benefit of all interests committed to his care, basing his judgment upon information amply sufficient to justify his decision. The information contained in the wireless message, if received from any other source, would have required him to return to the United States, and the fact that the information was received from the Managing Directors cannot change the situation.

If, however, the court is of the opinion that the effect of the wireless message was to substitute the authority of the directors for that of the master, we confidently submit that the facts within the knowledge of the directors not only justified them in recalling the *Cecilie*, but that a moral and legal obligation rested upon them to adopt the precise course which they pursued. A proclamation of threatening danger of war had been issued; a general warning had been sent out to German vessels by the Imperial Marine Office and they had received information from an authoritative source that a proclamation of the existence of a state of war, carrying with it a declaration of martial law, had been perfected and would immediately be published, and that short time ultimata would at once be sent to Russia and France. They knew that if they waited later than the afternoon of July 31st they would be unable to recall the *Cecilie* to the United States on account of coal shortage; they knew that she could not in ordinary course reach Plymouth, her first port of call, until the morning of August 3rd; that she could not cross the Channel and reach Cherbourg until some hours later, and that she could under no circumstances reach her home port of Bremerhaven before August 4, and that to reach her home port it would be necessary for her to pass through the full length of the English Channel and the Straits of Dover, encountering war vessels which were sure to be on the lookout for her.

The libelants have taken the position that the delivery of their gold at Plymouth and Cherbourg is the only question which concerns the Court, entirely ignoring the master's and owners' duty to the passengers, crew and German cargo owners.

In fact counsel for the libelants admitted in open court that it was extremely improbable that the *Cecile* could have arrived safely at Bremerhaven, which admission is referred to by the District Judge in his opinion (fol. 1600). Counsel asserted that this did not relieve the ship of her obligation to deliver their gold at the ports of destination.

Neither the master nor directors were under any obligation to sacrifice the ship, and the duty rested upon the directors, as well as on the master, to adopt reasonable precautions for the protection of the German cargo which would be subject to seizure in an English or French port, and the passengers of various nationalities, many of whom would be arrested in either of the ports of call or in the port of ultimate destination.

Wireless telegraphy furnished a method of communication with the ship, but the directors knew that as the crisis culminated, this method was becoming more and more uncertain, and would finally be entirely cut off, and the duty rested upon them to communicate with Captain Polack while they still had the opportunity. The dispatch of the wireless message was not the hysterical act of a panic-stricken director, but was the wise precaution of a well-informed board taken for the benefit of all concerned after painstaking inquiry and careful consideration of all the facts.

Wireless telegraphy does not deprive a shipmaster of his discretion but the obligation rests upon the owner on land in case he acquires information of danger threatening the ship, passengers or cargo to communicate with his master and give him appropriate instructions for the common safety. To hold that by so doing the owner is incurring liability would be contrary to public policy, for

it would discourage owners from utilizing an obvious means of safety.

If the officers and directors of a corporation which owns a ship owe a duty to passengers, crew and cargo as well as to the ship itself to use modern means of communication to inform the master of the ship of impending dangers which come to their knowledge such duty must carry with it a corresponding right. If the duty be to protect the different interests from threatening danger then when the duty is performed liability cannot grow out of the performance of it. Such officers and directors in these days of wireless telegraphy may, on account of their situation and their ability to command such means of communication, owe the duty of taking even peremptory action for the protection of all interests. But if they do owe such duty and exercise their best judgment they are entitled to the benefit of it. Every consideration which makes the judgment of the master controlling and effective as relating to all interests must operate to give the same effect to the judgment of the owner when he is required to act for the protection of all.

III.

To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril.

In *The Teutonia* (1872) L. R., 4 P. C., 171, the court says:

> "It was argued, however, on the part of the appellants, that, to justify this course,

both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though the master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which the ship and cargo were exposed, although it might afterward turn out that the information upon which the master acted was incorrect, yet that if the reported danger was to the ship alone the master must commit a breach of contract by deviating from the direct course of the voyage unless the danger actually existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in a direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port at Dunkirk, and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

Followed in *The San Roman* (1873) L. R., 5 P. C., 301.

IV.

The questions arising in the present cases are of both national and international importance, and the matters involved are in themselves of sufficient importance and sufficiently open to controversy to justify the granting of a writ of certiorari.

(1) *The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in The Styria, 186 U. S., 1.*

The points of conflict have already been discussed (*supra*, pp. 8-19).

(2) *A great number of vessels are in a situation similar to that of the "Kronprinzessin Cecilie".*

The record shows that on July 30th and 31st, 1914, 23 ships of the North German Lloyd and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought or remained in neutral ports; that no German steamer left Hamburg or Bremerhaven for any foreign port after August 1, 1914, and that the last English bound steamers of the Argo Company which left Bremerhaven on July 30th for London and Hull, upon instructions from their

company returned to Bremerhaven August 1st without having discharged (Stipulations, p. 352, fol. 1408; p. 354; p. 357, fol. 1426).

The uniformity of the action taken by all German ships would seem to indicate sufficient ground for apprehension of danger, but Judge Dodge in his opinion (pp. 446-7) says that the owner's evident object was "not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger". This view, if sustained, would lead to incalculable results.

(3) *The amount involved directly and incidentally.*

The libelants in the present cases demand $2,240,106.69 damages for the failure of the ship to deliver their gold at Plymouth, England, and Cherbourg, France. Other consignors shipped on the same steamer gold and silver bullion of the value of several million dollars, with respect to which shipments no suits have, as yet, been commenced.

If this decision be permitted to stand, not only these other shippers of bullion, but also shippers of cargo on all the other German ships whose voyages were interrupted will be encouraged to commence suit, resulting in interminable litigation. The total amount of these claims would, if allowed, be sufficient to bankrupt the German companies.

(4) *The cases are of international importance in that they affect all vessels of the German Mercantile Marine over which or over whose owners the United States Courts have jurisdiction.*

By reason of British control of the seas Teutonic vessels particularly were in a position of grave peril, and claims of the kind now in question will, if this decision be permitted to stand, be enforced against Teutonic vessels alone. It is peculiarly desirable that a decision of such far-reaching importance, affecting vessels of but one of the belligerent powers, should be reviewed by the highest court of the land.

(5) *Changes in the means of communication between owners on shore and their masters at sea, due to the invention of wireless telegraphy and the like, render it desirable that their rights and obligations as between themselves and as between them and the public should be fixed by the highest court.*

The majority of the Circuit Court of Appeals apparently consider that the adoption of modern methods of communication between owners and masters has deprived the latter of their discretion, and that while a loss through a peril excepted in a bill of lading will not render a ship liable to the cargo owner, a loss incurred in the avoidance of an excepted peril will, at the present time, fix a liability upon the ship, if information of the peril and the proper way to avoid it has been received by the master from the owner on shore.

The introduction of wireless telegraphy has greatly increased the safey of shippers, but if this decision be permitted to stand, the adoption of precautions by a master for the safety of his ship and the cargo, based upon information received from the ship owner, would involve the latter in a liability from which he would be free if the same

precautions were adopted upon information received from a different source.

(6) *The effect of the order of the German Imperial Marine Office.*

The record shows that on July 30, 1914, the German Admiralty Staff issued a general warning to the German Merchant Marine Service, and that on August 1, 1914, the Imperial Marine Office sent out a wireless message in the Government Code to all ships of the German Society for Wireless Telegraphy, which read: "Threatening danger of war. Do not touch at any port England, France, Russia" (Record, p. 259, fol. 1033).

This message, which was received by Captain Polack of the *Cecilie* on August 1st, raises the important question as to whether the order in itself does not constitute a "restraint," having been given by a branch of the German Government to a German ship after the proclamation of a state of war, which was in effect a declaration of martial law for all Germany.

Aside from its mandatory character the message was of the greatest importance as indicating that the situation was so grave that in the opinion of the German Government no German ship should touch at any of the ports mentioned; and yet the majority of the Circuit Court of Appeals have not even mentioned this message in their long and elaborate opinions, and in the face of this declaration of the German Government have decided that British and French ports were safe on August 1st and that they continued to be safe as late as August 3rd, and have held in effect that the owners and master of the *Cecilie* should have set up their own judgment against that of their Government.

(7) *The rules governing the rights and duties of foreign ships when their nations are in, or verging upon, a state of war are of national and international importance.*

For manifest reasons the rules governing the rights and duties of foreign ships when their nations are in or verging upon a state of war should be prescribed by the highest court of the land.

(8) *The majority of the Circuit Court of Appeals confuse principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.*

The majority of the Circuit Court of Appeals have held in effect that because in their opinion the circumstances of the present case would not justify an abandonment for a total loss, if the ship or cargo were insured under a policy covering losses through arrest or restraint, it necessarily follows that there was not such an arrest or restraint as to bring the cases within the exception in the bill of lading.

Policies of insurance are contracts of indemnity and in order to justify a recovery the insured must prove, first, that there has been an actual loss of the thing insured, and second, that the proximate cause of the loss is specifically covered by the policy.

To warrant a recovery under a policy of insurance covering arrest and restraint of princes, etc., it is not sufficient to show that the subject of insurance was *in danger* of loss, or that a loss was actually sustained through *fear* of a peril insured against.

In England a technical and strict rule of interpretation has been applied to losses of this char-

acter, and it has been held that even where delivery of a cargo at the port of destination has been prevented by an effectual blockade, and the master, in order to avoid the risk of certain capture put into another port or returned to the port of departure, the loss was one due to the *fear of capture*, and not to one resulting from the peril insured against.

Through all these insurance cases runs the same principle, viz., that to justify an abandonment and claim for a constructive total loss, the peril insured against must have operated *directly* upon the subject of insurance. While the Supreme Court of the United States and the Courts of New York and Pennsylvania have slightly modified the application of the English rule, they still adhere to the principle that the insured peril must operate directly, and not circuitously, upon the subject of insurance. The distinction is not one of principle, but in the application of the principle.

In *Olivera v. Union Ins. Co.* (3 Wheat., 183), an action was brought on a policy in favor of Spanish subjects on a cargo from Baltimore to Havana. The vessel having sailed and being near the mouth of the Chesapeake, February, 1813, the master descried four British frigates, officers from which boarded his vessel and indorsed upon the papers that the Bay of Chesapeake was under blockade, and ordered him to return, and not again to attempt to go out. The blockade was not known in Baltimore when the the vessel sailed. The voyage was thereupon given up, and the cargo abandoned to the underwriters. This loss was held to be covered.

Marshall, C. J., delivering the opinion of the court remarked that an embargo was admitted to be a peril within the policy and added, "The ap-

plication of force is not more direct on the vessel stopped in port by an embargo, than on the vessel stopped in port by blockading squadron."

In commenting on this decision Mr. Phillips in his work on insurance says, "A distinction is made by the court in this and also a subsequent case, between occlusion in a port, bay, or river, and an exclusion from it; the former being held to be an arrest, restraint and detention within the policy; the latter, not so." *Phillips on Insurance*, Vol. 1, Sec. 1114.

In all these insurance decisions we find an apprehension in the mind of the court, that, to allow a claim for a constructive total loss by arrest or restraint where the thing insured was not actually lost by the *direct* operation of one of these perils, would afford to the insured an inducement to create imaginary dangers whenever the cargo is not likely to reach the port of destination in a sound state, or where the owner has reason to believe that his venture, if carried out, will be unprofitable.

This is well expressed by Lord Alvanley, Ch. J., in *Hadkinson v. Robinson* (3 Bos. & P. 388):

> "*If we were to decide that the sale at Port Mahon was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice of abandonment, to throw a loss upon the underwriters to which they are not liable by the terms of the policy.*"

There is also the further consideration that inability to complete the voyage does not necessarily result in the total destruction of the thing insured.

This is aptly expressed by the Lord Chief Justice in the case last cited (392):

> "But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoid that port, whereby the object of the voyage is defeated, *such circumstances do not amount to a peril operating to the total destruction of the thing insured.*"

Very different considerations enter into the determination of cases arising under bills of lading.

> "Bills of lading contain an undertaking by the shipowner or carrier to deliver safely the goods set forth in them, unless prevented by certain perils known as 'excepted perils' or exceptions, provided that such perils and their consequences could not have been avoided by reasonable care and diligence on the part of the shipowner or carrier and his servants."
>
> *Scrutton on Charter-parties and Bills of Lading*, 7th Ed., p. 195.

A bill of lading constitutes the contract between the shipper and carrier, and where the latter undertakes to exercise reasonable care to prevent a loss from an excepted peril, there is a correspond ing assent by the former that the carrier may adopt reasonable precautions to avoid such peril. *It would be an absurdity to hold that the performance of a duty creates a liability for damages.*

In the case of a policy of insurance, if an insured peril be the proximate cause of the loss, it is immaterial that some other cause may have contributed to the loss, as for example, the negligence of the insured's servants.

In the case of a bill of lading, even though the

excepted peril be the proximate cause of the loss, this will not protect the carrier if the negligence of his servants be a contributing cause, nor if after a loss without such contributory negligence, they fail to take reasonable care to minimize the damage. In the latter case the carrier will be responsible for the increased damage although not liable for the original damage.

Notara v. Henderson, L. R. 7 Q. B., 225.

While the maxim "*causa proxima, non remota, spectatur*," has been held to apply to policies of insurance it does not apply to bills of lading.

So if "restraint of princes" be covered by a marine policy and excepted by a bill of lading, in the former case, to render the underwriter liable, the restraint must "operate directly" upon the subject of insurance, and a loss incurred in the avoidance of the restraint is not collectible.

As was said by Bailhache, J., in *Becker v. London Assurance Corp.* (1915) 3 K. B., 410, "*It is clear that the avoidance of a peril * * * is not the same as loss by the peril itself.*"

In the case of a bill of lading, however, it being the duty of the carrier not to expose the shipper's goods to a restraint, he incurs no liability by performing this duty, even if the precautions adopted involve a deviation from his course.

But discussion of this subject is of academic interest merely, for the courts of Great Britain and this country have uniformly refused to apply the insurance rule of construction to cases arising under bills of lading, notwithstanding the fact that in nearly all of the latter cases the libellants have insisted upon the analogy of the insurance decisions.

The true rule is as follows: *A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct*

course and taking such steps as a prudent man would take for the purpose of avoiding danger, and in so doing he is entitled to consider the safety of his ship as well as the cargo, and the safety of the belligerant as well as of the neutral cargo.

In *Nobel's Explosives Co. v. Jenkins* (1896) 2 Q. B. Div., 326, although there was a probability of capture, if the ship in question continued on to Yokohama, her port of destination, that probability did not in any sense amount to a "practical certainty," nor had an arrest or restraint of princes, etc., commenced to operate when the master put into Hong Kong and discharged his contraband cargo. It was for fear, that if he continued on his voyage, the contraband cargo would be subjected to the excepted peril, that he discharged it at the port of Hong Kong.

And yet, had the contraband cargo been insured under a policy covering arrest and restraint, the probability of capture would not have justified an abandonment to the underwriters at Hong Kong; for fear of an arrest, is not the same as an arrest, and the peril insured against had not commenced to operate directly upon the subject of insurance.

In the case cited, Mathew, J., said (p. 331):

> "It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by a sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* and *Rodoconachi v. Elliott* • • • I find that the captain in refusing to carry the goods farther, acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by re-

straint of princes and rulers within the meaning of the exception."

Later the learned judge said:

"But, apart from the terms of the bill of lading it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, J., in *Notara v. Henderson*, 'a fair allowance ought to be made for the difficulties in which the master may be involved. * * * The place, the season—the opportunity, and means at hand, the interests of other persons concerned in the adventure, and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short all circumstances affecting risk, trouble, delay and inconvenience, must be taken into account.' I am of the opinion that the course taken by the captain in landing the goods and landing them in safe custody, was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

In *Pole v. Cetovich* (1860) 9 C. B. [N. S.] 430, the plaintiffs' counsel made precisely the same contention as is made by the libellants in the present case. They argued that the defendant's agreement was absolute and that the mere apprehen-

sion of capture was no justification for its non-performance. Byles, J., interrupted the argument by saying, "You say the defendant was bound by his contract. * * * The question is, whether the defendant was not bound to take all reasonable precautions to render the risk as little as possible." This case was cited with approval by the Privy Council in *The Teutonia* (1872) L. R. 4 P. C., 171, where the Court says: "It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetovich* (9 C. B. [N. S.] 43), is an authority in point." In *The San Roman* (1873) L. R. 5 P. C., 301, the expression used by the Court is "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience."

If the case of *Pole v. Cetovich* had arisen under a policy of insurance, it could not for a moment be contended that there had been a constructive total loss and no abandonment would have been justified, for the master refused to leave Falmouth because he apprehended danger from French cruisers if he proceeded to Copenhagen; but the danger from French cruisers never operated directly upon the ship or cargo, and the proximate cause of the plaintiffs' damage was not an arrest or restraint, but the refusal of the master to proceed on his voyage.

In all the cases we have cited the master was held justified in adopting reasonable precautions to avoid the operation of the excepted peril, even though such precautions involved a deviation from his course or an abandonment of the voyage. And yet, in not one of them, if the question had arisen under a marine policy covering losses incurred through arrest and restraint, would it have been held that there was a constructive total loss or that an abandonment to the underwriters would be justified.

(9) *Equal division of federal judges renders it especially desirable that the cases should finally be disposed of by this Court.*

These cases have been passed upon by four federal judges,—one sitting in the District Court and three in the Circuit Court of Appeals. Of these four judges two have decided that not only was the return of the *Cecilie* to the United States justified by the circumstances, but that it was the duty of the captain to act precisely as he did.

It would be unfortunate if such a divided opinion should be the final sanction for imposing an overwhelming liability on all German shipowners. The case is peculiarly one which calls for a final determination by this Court. The questions arising out of the present controversy are of both national and international importance and the matters involved are in themselves of sufficient importance and are sufficiently open to controversy to justify the granting of the writ. And all this is especially true in view of the present international situation.

The application is made at the present time for the following reasons:

(a) If the application were postponed until after the entry of a final decree, much time would

be consumed and expense incurred in taking proof of damages before a commissioner. Many other claims of great magnitude are dependent upon the determination of the principles of liability in these cases, and if, as we confidently believe, upon a review of the record, this court should hold that the *Cecilie* is not liable, the principle of liability will be determined for all other German ships in a like situation.

(b) The damages claimed by the libelants in these cases are so large in amount and speculative in character that it is impossible for the claimant to file a bond and thus release its ship. Indeed under existing conditions it would be absolutely impossible to give a bond, and if the libellants should undertake—as they might—to have the *Cecilie* sold, vast and irreparable damage might be done to the claimant before it would have opportunity to apply again for a writ of certiorari.

(c) The case is peculiarly one where a prompt decision is essential to the protection of the rights of the claimant.

It is hoped most earnestly that the Court will entertain this application at the present time as, of course, it has the power to do.

V.

It is respectfully submitted that the petition should be granted and a writ of certiorari issue as prayed in the petition.

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Supreme Court of the United States

OCTOBER TERM 1916.

NORTH GERMAN LLOYD, CLAIMANT OF STEAMSHIP KRONPRINZESSIN CECILIE,
Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK,
Libelant-Respondent.

No. 922.

SAME CLAIMANT,
Petitioner,

against

NATIONAL CITY BANK OF NEW YORK,
Libelant-Respondent.

BRIEF FOR NORTH GERMAN LLOYD.

*Certiorari to the United States Circuit Court of Appeals for the First Circuit.**

Statement of the Cases.

On October 21, 1914, the respondent, Guaranty Trust Company of New York filed its libel against S. S. *Kronprinzessin Cecilie*, belonging to the

*An alien enemy may defend and have the benefit of an appeal. McVeigh v. U. S. 11 Wall., 259, 267.

petitioner, North German Lloyd, seeking to recover $1,793,278.22 damages for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold bars from New York to Plymouth, England (Libel, pp. 1-5).

On November 16, 1914, the respondent, National City Bank of New York, also filed its libel against said steamship seeking to recover $404,150.06 for an alleged breach of contract on the part of said steamship in failing to carry a consignment of gold bars to Plymouth, and $32,007.43 for an alleged breach of contract in failing to carry another consignment of gold from said port of New York to Cherbourg, France (Libel, pp. 108-115). By amendment of its libel the claim of the Bank was subsequently increased to $446,828.47 (Amended Libel, pp. 134-142).

The petitioner, as claimant, filed its answers to these libels, which answers are substantially identical in form (Answers, pp. 7-15; 143, 116-128).

The answers admit the receipt of the gold bullion and allege that the carriage thereof was undertaken by the claimant subject to the conditions and exceptions contained in the bills of lading, and subject also to the possibility of the ship being prevented from completing her voyage and being forced to put back into a port of refuge in case of the outbreak, or threatened outbreak, of a European war. They admit that the steamship turned back on her course, but allege that at the time of turning she was about 1070 miles from Plymouth. They allege that the decision of the master to return to a United States port was based upon credible information re-

ceived by him from the North German Lloyd office, at Bremen, in a wireless message, that war had broken out, involving Germany with Russia, France and England, and that this message, considered in conjunction with the information with respect to the European crisis received by him prior to sailing, furnished reasonable ground for him to apprehend that the steamship and cargo would be captured if she continued on her voyage and required him in the exercise of sound judgment and discretion to put back to a port of refuge; that if war had not actually broken out at the time of the receipt of this wireless message, still the master, in anticipation of the outbreak of hostilities and the consequent danger of arrest of the members of his crew, the arrest or prolonged detention and discomfort of his passengers and the capture of his ship and cargo, would have been fully justified in adopting the precise course which he pursued (pp. 7-9; 143, 116-122).

The answers deny that the steamship had violated any contractual or other duty; admit that on or about August 8th the libelants accepted redelivery of the gold; allege that such redelivery was at the libelants' special request contained in two letters, copies of which are annexed thereto marked Exhibit B (pp. 18-20, 130, 131) and deny that by reason of the alleged failure of the steamship to deliver the gold at Plymouth as agreed libelants have suffered any damage (pp. 9-10; 119-120).

As a Second Defense, the answers set forth at length the facts in connection with the shipment of the gold, the incidents of the voyage, the

danger of capture had the ship proceeded on her voyage, and alleges that the action of the captain in directing the return of the steamship to the United States, where the rights of all those interested in both ship and cargo would be respected and protected, was in concurrence with the instructions received from her owners, and that such instructions, and the action following them, were fully justified by the circumstances, and were the exercise of a right given by the laws of the United States, as well as by Article 634 of the German Maritime Code, which provides in substance that if a war be declared after the commencement of a voyage in consequence of which a vessel or the goods shipped thereon can no longer be considered free and would be liable to risk of capture, either party has the right to withdraw from the contract without being liable to damages, and by Articles 669 and 670 of said Maritime Code and by other provisions of the laws of Germany (pp. 10-13; 122-6).

The answers further allege that the course pursued by the captain was entirely successful, and that his return to a port of refuge and the delivery of all the specie to the parties entitled thereto were accomplished without the capture or detention of a single passenger or member of the crew and without loss or damage to any of the specie or mixed cargo (pp. 13-14, 126).

As a Third Defense, the answers set up an exception in the bill of lading against liability for loss or damage "occasioned by arrest and restraint of princes, rulers or people" (pp. 14; 127).

As a Fourth Defense, the answers set up a provision in the bill of lading whereby neither the ship or carrier should in any case be responsible for a value greater than that declared by the shippers in the margin; it alleges that the value of the shipments in question was declared by the libelant in the margin to be as stated therein; that all the gold, representing said shipments and value so declared, was redelivered by claimant to the libelants at Bar Harbor and that immediately upon such redelivery all further responsibility of the claimant or its ship ceased (pp. 14; 127).

As a Fifth Defense, the answers allege that it was agreed that time should not be of the essence of the contract, and that the bill of lading expressly provided that the steamer should have "liberty to call at Intermediate Ports or any port or ports in or out of the customary route in any order, to receive and discharge coal, cargo, passengers, and for any other purposes", and that it was further agreed that the steamer should have liberty to put into a port of refuge, and that neither the steamer nor carrier should be liable for "loss or damage by prolongation of the voyage" (pp. 15; 128).

The cases were tried together (with two other suits brought by passengers) before the District Court for the District of Massachusetts, which entered decrees dismissing the libels (Decrees, pp. 405, 408).

Both libelants appealed to the United States Circuit Court of Appeals for the First Circuit which, by a divided Court, reversed the decrees of

the District Court and remanded the cases, with directions to enter interlocutory decrees for the libelants.

The opinions of Judge Hale dismissing the libels are printed in the record (pp. 368-401; 402) and also appear in 228 Fed. Rep., 946. The opinion of Judge Dodge, the concurring opinion of Judge Bingham and the dissenting opinion of Judge Putnam are also printed in the record (pp. 435, 447, 459) and appear in 238 Fed. Rep., 668.

Substantially all the facts are covered by stipulations which appear in the record (pp. 163-220; 310-315; 346-357). The material facts are stated in the opinion of Judge Hale and such statement is accepted in the opinion of Judge Dodge and in the dissenting opinion of Judge Putnam (pp. 435, 459).

Outline of historical events prior to the shipments in question.

On June 23, 1914, Archduke Francis Ferdinand of Austria and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia.

On July 23, 1914, Austria sent an ultimatum to Servia, and on the following day Russia urged Austria to abandon the time limit of her ultimatum "in order to prevent consequences incalculable and fatal to all the powers", and at the same time informed the other powers that if the Austro-Hungarian Government should make war on Servia, Russia could not allow the conflict to be settled between those two countries alone; France declared that she "would fulfill all the obligations entailed by her alliance with Russia, if necessity

arose"; the German Government declared that there was only the question of a matter to be settled between Austria-Hungary and Servia, and that other powers ought to reserve it to those two, because interference of another Power, owing to different treaty obligations, would be followed by incalculable consequences.

On the following day, July 25th, Austria declined Russia's request for an extension of the time limit in the ultimatum to Servia; Servia replied to the Austrian ultimatum; Austria advised Servia and the other powers that she considered Servia's reply unsatisfactory, and the Austrian Minister left Belgrade; Germany confined her Alsace-Lorraine garrisons in barracks, and placed the frontier works of Alsace-Lorraine in a complete state of defense, while the populace in Berlin made demonstrations in favor of war; Servia ordered mobilization; Russia began to take military precautions, and martial law was proclaimed in Austria.

On July 26th the Austrian Government ordered mobilization against Servia; the Servian army began mobilization; Belgium increased her army to enforce neutrality; the German fleet was concentrated in home waters and the German Ambassador at St. Petersburg was directed to make the following declaration to the Russian Government:

"Preparatory military measures by Russia will force us to counter measures which must consist in mobilizing the army. But mobilization means war. *As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France.*"

On the same day Sir Edward Grey proposed to the Powers a conference in London; Austria notified the Powers that the refusal of Servia to accept the Austrian demands in full, without reservations, would compel Austria to force Servia by the most drastic measures to a complete submission; Russia announced that she could not be asked to allow Servia to be crushed; the German fleet in Norway put to sea.

On July 27th, Germany completed her requisitions and placed her covering troops in position in Alsace-Lorraine; Russia notified Austria that, if war broke out between Austria and Servia, Russia would not give way; the Vienna and Budapest bourses closed; a skirmish occurred on the Danube between Austrian and Servian forces; England stated to Germany that if Austria should invade Servia, she would prove she wished to crush a small state, thus raising a European question, and that a war would ensue in which all the Powers would take part; a state of war was declared in the Russian province of Kovno; the Belgian army was mobilized; shots were fired by a Cossack patrol on a German patrol at the Russian frontier; the 14th Corps of the French army discontinued manoeuvres, and returned to its garrison, and Germany refused Sir Edward Grey's proposal for a conference.

These political events, and others of minor importance, are referred to in the Record (pp. 173-181).

The European crisis was discussed at length in the American newspapers, and was the subject of great public interest in this country.

At the time of the shipment of the gold in question the European situation was serious, but the

prevailing opinion in this country was that the diplomats of the respective Powers would succeed in arriving at a satisfactory understanding.

Statement of Facts.

The North German Lloyd steamship "*Kronprinzessin Cecilie*" was built in the year 1907 at a cost of about $4,500,000. On July 27, 1914, she was lying in the port of New York and on that day received on board consignments of gold and silver bullion of the total value of more than $11,000,000 to be carried to Plymouth, England, and Cherbourg, France.

The Guaranty Trust Company of New York shipped 93 kegs of gold bullion of the value of $4,942,937.64 to be carried to Plymouth, and thence to be forwarded to London and there delivered in like good order and condition unto the order of the libelant in consideration of $9,268 prepaid freight (Stipulation, p. 164, fol. 653).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the Trust Company the sum of $1,544.67, the proportion of the prepaid freight covering the inland transportation of said Trust Company's gold from Plymouth to London (Stipulation, p. 167, fols. 666-7).

The National City Bank of New York shipped 21 kegs of gold bullion of the value of $1,061,718.89 to be carried to Plymouth and thence to be forwarded to London and there delivered unto the London City & Midland Bank, Ltd., in consideration of $1,990.72 prepaid freight, and 40 kegs of gold bullion of the value of $2,104,254.34 to be carried to Cherbourg, France, and thence

to be forwarded to Paris and there delivered unto the Credit Lyonnais in consideration of $2,630.32 prepaid freight (Stipulation, pp. 311-12).

On the 17th day of November, 1914, the claimant, without admitting liability, refunded to the National City Bank of New York the sum of $331.79, the proportion of the prepaid freight covering the inland transportation of said Bank's gold from Plymouth to London, and the sum of $657.58, the proportion of the prepaid freight covering the inland transportation from Cherbourg to Paris (Stipulation, p. 314, fol. 1255).

Neither the Trust Company nor the Bank made any statement of the purpose for which its shipment was made, otherwise than as stated in the bill of lading, or of the disposition which it intended to make of its gold, and no notice of any special damages which might result from the failure of the steamship or of the claimant to perform its contract (Stipulation, p. 164, fol. 655; p. 312, fol. 1247).

The bills of lading were in the usual form, containing, among other stipulations, an exception against liability occasioned by "arrest and restraint of princes, rulers or people" (Bills of Lading, pp. 17, 129, 133), and there were other provisions or exceptions contained in them in favor of the shipowner, indicating that time was not regarded as of the essence of the contract.

The freight received by the claimant for these shipments was about one-eighth of one per cent. of their value.

The ship carried a full complement of officers and crew amounting in all to 645 men. Altogether

there were about 1892 persons on board comprising 354 Americans, 667 Germans, 406 Austrians, 3 Italians, 151 Russians, 7 French, 14 English, 1 Australian, 2 Belgians, 4 Spaniards, 2 Swiss, 3 Cubans, 8 Bulgars, 7 Serbs, 1 Roumanian, 1 Greek and 3 Hollanders, besides a large number of passengers of whose nationality there was no record at the time of the trial (pp. 302, 303).

These persons represented substantially all the nations which subsequently became involved in the war.

The *Cecilie* sailed early in the morning of July 28th and continued on her eastbound voyage until at about 10 P. M. on the night of July 31, 1914, when 1070 nautical miles from Plymouth, her first port of call, she received a wireless message from her directors at Bremen stating that war had broken out with England, France and Russia and advising that she put back to New York (Stipulation, pp. 164-165, fols. 656-660).

Captain Polack thereupon turned his ship and put back towards the United States. *The following day he received a wireless message from the German Imperial Marine Office forbidding him to touch at any port of England, France or Russia* (p. 259, fols. 1033, 1031).

When nearing New York, on account of supposed danger from British cruisers, Captain Polack directed his course to Bar Harbor, Maine, where the ship arrived safely on August 4th, and all the gold and silver bullion was returned to the parties entitled thereto.

The directors of the North German Lloyd, before they dispatched their wireless message, knew

of all the important political events which had transpired since the assassination of Archduke Ferdinand and his wife, and had received authoritative information from high governmental sources of the events immediately preceding active hostilities. Thus they had been informed of the proclamation of threatening danger of war for the German Empire and had received from the Imperial Admiralty Staff the general warning sent out to all ships of the German Mercantile Marine; they had been notified by Baron von Plettenberg, one of their number who had been sent to Berlin, that he had been informed by government officials that short time ultimata were to be sent at once to Russia and France and that an Imperial proclamation, declaring the existence of a state of war, had been perfected and would immediately be made public (fols. 1389-1405).

The Lloyd's nautical department had been constantly engaged in figuring the positions of their ships and their coal supplies and knew that a determination with respect to the *Cecilie* would have to be reached early in the afternoon of July 31st, for otherwise she would not have sufficient coal to return to the United States (fols. 1395, 1406). The correctness of their estimate is shown by the fact that when she finally reached Bar Harbor there remained in her bunkers only 450 tons, which was much less than a day's supply (fol. 997).

Before leaving New York Captain Polack, master of the *Cecilie*, had carefully read the American newspapers and had kept himself informed as to the progress of events (fol. 998). While on the voyage he received by wireless much additional

information indicating that the political situation was becoming more acute, and, when in conference with his chief officer, expressed grave anxiety as to the situation and a desire to obtain information from the Home Office (fols. 914-939, 1041). When, on the night of July 31st, he received the message from his directors, the instructions given to return to New York coincided exactly with his own judgment and this course seemed to him to be the best and only thing to do in the circumstances (fols. 1039-1040).

That the return was fully justified is conclusively proved by the fact that on August 1st Captain Polack received from the Imperial Marine Office at Berlin a wireless message forbidding him to touch at any English, French or Russian ports (fols. 1026, 1031-3).

Judge Hale, before whom the case was tried in the District Court, made a careful examination of the evidence and decided that he (the master) "acted not only with a due regard to his communication from the owners of the ship, but in accordance with the dictates of his own prudence and sagacity." So far as the claimant's directors were concerned the learned judge held that they "acted with a reasonable apprehension of imminent peril, when they sent the wireless message to their captain," and that "the master acted with due regard to the safety of all interests intrusted to him, and under a reasonable apprehension of imminent peril" (fols. 1575, 1602-4).

The learned judge arrived at this conclusion "without considering the terms of the bill of lading, for the reason that the master was justified in his action by the duty imposed upon him under

the maritime law" (fol. 1604). He accordingly dismissed the libels.

In referring to Captain Polack, Judge Hale said that he impressed him "as being a truthful man, and a faithful, trustworthy shipmaster. He showed a clear appreciation of the trust imposed in him" (fol. 1548).

Judge Dodge said that the master's testimony at the trial impressed him "as it did the District Court, with its apparent truthfulness" (p. 439).

Judge Putnam entertained the same views of the merits of the case as Judge Hale, in fact he regards the case as too clear to require argument or the citation of authorities, for he says (p. 465), "It is unnecessary to cite authorities on this topic, because the law is too well settled and the underlying principles are all too uniformly accepted, in the circumstances of this case, to the effect that it was not only the right but the duty of the master of this ship not to delay, and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture, and to have due regard to the uncertainties of the ocean, and leave reasonable margin for the state of weather and for accidental detentions; and under the circumstances of this case the decision to turn back was justifiable whether it came from the master or owners."

Judges Dodd and Bingham, constituting the majority of the Circuit Court of Appeals, differed from Judges Putnam and Hale and decided that the return of the *Cecilie* was unjustified and the ship liable in damages to the libelants, basing their decision, not upon broad principles of mari-

time law, but upon narrow and technical reasoning to the effect that Captain Polack acted under orders from his directors; that therefore the return of the ship to the United States cannot be justified as a reasonable exercise of the master's discretion; and that notwithstanding the fact that a declaration of threatening danger of war had been proclaimed and that a proclamation of the existence of a state of war had been prefected, the statement in the message that war had broken out was not literally true. Judge Bingham goes so far as to say that "to permit the claimant to avail itself of the master's decision obtained under such circumstances, would be the equivalent of according to one the protection of a judgment which he had procured through fraud" (p. 451).

The majority of the court hold in effect that the owner on shore has no general discretion as has the master on the ship, and that war not having actually been declared when the ship was turned, there was no arrest or restraint within the meaning of the exception in the bills of lading, *and that there could be no arrest or restraint before the existence of an actual state of war* (pp. 444, 456).

POINTS.

I.

The decision of the Circuit Court of Appeals is in conflict with the Styria, 186 U. S., 1.

In the *Styria* case the facts were as follows:

The *Styria*, an Austrian steamship, sailing from

Trieste *via* Sicilian ports to New York, took on board at Port Empedocle, Sicily, a quantity of sulphur for New York. She reached Port Empedocle on April 21, 1898, and her master began at once to load on board the sulphur in question, and by April 24th it was all on board and bills of lading, excepting "restraints of princes and rulers, or people," had been signed, and the vessel cleared from the Custom House, and was ready to proceed on her voyage to Messina and Palermo for a cargo of fruit, and thence to New York. In the meantime, unknown to the master, war had broken out between the United States and Spain, and on April 22nd, the first act of war, the capture of a Spanish merchant steamship, the *Buena Ventura*, was committed. On April 25, the Queen Regent of Spain issued a decree announcing the existence of war, and declaring sulphur, among other things, to be contraband.

On April 23rd, the master of the Styria received a telegram from Burrill & Sons, her managing agents in London, directing him not to sail until further orders; and on April 25th, another telegram directing him, "to discharge whole cargo as quickly as possible," without assigning any reason for this order. The master had by this time learned that war existed, and that sulphur was contraband. In obedience to the instructions from the managing agents, as well as because he saw in the newspapers that sulphur was contraband, the master began to reland the sulphur at Port Empedocle on April 27th, and had it all unloaded and warehoused by May 7th. On April 30th and May 2nd the shippers of the sulphur protested against the unloading.

The exportation of sulphur is one of the principal industries of Sicily and immediately after the declaration of war, Sicilian merchants urged the Italian Government to request Spain to exempt it from the list of contraband. The representations of the Italian ambassador in Madrid, resulted in a declaration by the Spanish Government, that it would permit sulphur to pass free, and would advise its naval commanders to that effect. The negotiations between the Italian and Spanish Governments were published in the Italian newspapers and it was also reported that the negotiations would be, and later that they had been, conducted to a successful termination.

On May 5-6, the Journal of Sicily published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, which read in part as follows: "*I would also state that, in consequence of our request, the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free. (Signed) The Minister, Cocco-Ortu.*"

These reports were read by the master of the *Styria*.

The sulphur was not wholly discharged until May 7th. In the meantime "a vessel which lay alongside the *Styria* at Port Empedocle, loading sulphur, sailed before she did, and arrived at New York in safety on May 19th. *Two other vessels laden with sulphur came safely from the Sicilian Port of Licata to the United States about the same time, and no ships were taken by Spain during the war*" (p. 7). The master, acting under the orders of the agents, which were in accordance with his own judgment, as he did not think

the newspaper reports sufficiently "authentic", sailed without the sulphur.

The District Court held that the discharge of the cargo was too hasty and precipitate and not justified by the facts of the case.

On appeal to the Circuit Court of Appeals, it was held that the sulphur was rightly discharged, but should have been reloaded before the *Styria* left Port Empedocle.

The case having been brought to this Court by a writ of certiorari, it was held that the master was justified in landing and storing the cargo, and that it was not made his duty by the facts brought to his notice to reship the sulphur on the *Styria* and further delay the voyage.

The Circuit Court of Appeals has unsuccessfully attempted to distinguish the present cases from the *Styria* in four important particulars:

(a) In the present cases the majority of the Circuit Court of Appeals refuse to justify the return of the *Cecilie* as an exercise of her master's discretion, upon the ground that, having received from his owners an order to put back, he was deprived of all discretion. In this connection Judge Dodge says (p. 437):

> "The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back; and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained."

If this statement be correct, the owner must prove three facts:

1st. That circumstances actually existed which would justify the master in turning back.

2nd. That the master had full knowledge of all these circumstances when he turned back, and

3rd. That in turning back there was an "actual exercise" of such discretion by him "in view thereof".

It would not be sufficient for the owners to prove that when the ship turned back there had been an actual declaration of war betwen Germany and England, France and Russia, nor would proof of the additional fact that the master was fully informed of such declaration be sufficient unless they could show that in turning the ship the master acted entirely upon his own judgment and discretion, without any order or suggestion from the owners, who were on shore and in a position to have the best possible information as to actual conditions.

Later the learned judge says "the owner's direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. * * * By assuming to direct from Bremen, as it did, the course which the ship should take, her owner assumed, for itself and its ship, all such responsibility and lost all right to charge the master with any share thereof" (p. 438).

In this connection the majority of the Circuit Court of Appeals have ignored the fact that in the case of *The Styria*, and in the case of *Nobel's Explosives Co. v. Jenkins* (L. R. [1896] 2 Q. B.,

326), approved in *The Styria* case, the masters acted under orders received from their owners which were just as peremptory as the order received by Captain Polack.

In *The Styria*, Mr. Justice Shiras, writing the opinion of this Court, referred (p. 19) to a suggestion that had been made by the District Judge, and repeated in the argument for the libelants, "to the effect that the master was guided in his action in discharging the contraband cargo by a telegram from Burrill & Sons, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time". In disposing of this contention the learned justice says:

> "(This) does not appear to us to be supported by the testimony of the captain, which is the only evidence on the subject. Is is true that he did state that he acted under instructions of the agents, but he alos said, in reply to questions put on cross-examination as follows:
>
> 'Now, Captain, you say that you put this brimstone ashore on instructions of the managing owners? Answer: Yes, and also because I knew that the war was there, and I acted on the bill of lading clause. Question: You have testified, haven't you, that all this you did by orders? Answer: No. The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deemed it not safe to proceed with the cargo that was declared contraband of war.' "

Mr. Justice Shiras then proceeds as follows (p. 20):

"'Without transcribing all of the master's testimony, but having read and weighed it, we are of opinion that it clearly shows that, while he carried out the instructions of the agents, his judgment, on the facts confronting him, was that it was not safe for him to proceed with the contraband cargo, nor proper to await indefinitely for the uncertain results pending negotiations between Italy and Spain. His conduct, as we have already said, had due regard to the interests of all concerned in the ship and in the cargo, both that which was contraband and that which was not so. So far as the shipowners were concerned, he had the approval of the managing agents; so far as the shippers and consignees were concerned, he acted upon his own judgment, exercised, apparently in good faith, on their behalf.

In the case of *Nobel's Explosives Co. v. Jenkins,* just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners, if it were possible to get it before the emergency was over; and all that can be said is, that there was a concurrence of judgment between the ship agents and the master as to what was the proper course to pursue."

In the present cases there were certain facts which made Captain Polack's position one of peculiar responsibility.

The *Cecilie* was one of the most valuable vessels afloat, having cost approximately $4,500,000, and carried 1892 persons of practically every nation which subsequently became involved in the

war, principally Germans (pp. 302-303). A great number of these persons would be subject to arrest if war should break out while the ship was in Plymouth, Cherbourg or Bremerhaven.

The ship carried mixed cargo consigned to German consignees at Bremen, of which the total value was $139,335 (p. 11, fol. 41).

The sailing of the *Cecilie* with a large amount of gold bullion was contemporaneously published in the leading newspapers of America and Europe, and was given great notoriety throughout the world (p. 308, fol. 1233), and Captain Polack had reason to assume that enemies' vessels would keep a bright lookout for so rich a prize.

The situation required the exercise of greater caution than in the case of an ordinary merchant vessel.

Before sailing Captain Polack had kept in touch with the political situation and knew in a general way how events had been developing, and after leaving New York he received, from time to time, wireless messages informing him as to the progress of events.

These news items were published in the "Ocean Gazette," a newspaper printed on the *Cecilie* (Libelant's Ex. 3, pp. 232-4; Libelant's Ex. 2, pp. 229-31).

The news thus received indicated that the situation was becoming more and more acute.

On July 29th the Gazette published a wireless dispatch from London announcing the formal declaration of war by Austria against Servia and active hostilities between the two countries: the refusal of Germany and Austria to accept the proposal of Sir Edward Grey for a conference of

ambassadors of the powers in London; the issuance of orders for the German fleet to concentrate in home waters and an announcement that the British first and second battle squadrons were in readiness for service; a dispatch from Berlin to the effect that a Russian force had occupied positions near the frontier of Russian Poland and that a squadron of German cavalry had also advanced to the frontier; an announcement that Emperor Franz Josef had granted complete amnesty to all Austro-Hungarian subjects who had deserted from the army or who had emigrated to other lands to avoid military duty.

On July 31st, the Ocean Gazette published the following news items:

An ultimatum from Germany to Russia demanding an explanation for the latter's mobilization, the answer to be given within 24 hours; fighting between Austrian and Servian forces at several points; a report that the southern column of Austrians in Bosnia was watching the Montenegrin troops, and that in a severe battle in Bosnia the Austrians had defeated the Servians, with many killed on each side; and announcement that the gravity of the international situation was recognized in all European capitals; that Russia was proceeding with her mobilization of a large number of troops while the French defensive forces were taking extensive precautions; that business was practically suspended on the London Stock Exchange pending the serious war situation and that dealers refused to make prices; that the consols had reached a record low price of 69½, the lowest in a century, and that seven failures were reported; that the St. Petersburg, Vienna, Buda-

pest and Brussels Exchanges remained closed and that two failures had been announced on the Glasgow Exchange; a declaration by the Shimbum, a semi-official newspaper of Japan, that if England were attacked, Japan would give assistance to the British arms, and a dispatch from Washington to the effect that administration officials were awaiting additional developments in European politics, and that if nations other than Austria and Servia were drawn into the conflict, a proclamation of neutrality covering the entire situation would probably be determined upon by the State Department.

The news received during the eastbound voyage increased Captain Polack's anxiety. He discussed the matter with his chief officer on the night of July 30th and, as he expressed it, he was very anxious to "get news from home about the political situation and about this war" (fol. 1041). All the news he received indicated that the situation was rapidly becoming more critical so that when he received the message from his managing directors, whom he assumed to be well-informed the course which appealed to his best judgment as the best one to pursue was to turn back to the United States and not run into any danger; that seemed to him the best and only course (p. 260).

The wisdom of this course was fully confirmed when on the following day he received the wireless message from the Imperial Marine Office.

In the cases at bar the master's judgment was based upon (a) the information he obtained before sailing; (b) the information he obtained on the voyage indicating the increasing gravity of

the situation, and (c) the information acquired from his directors at Bremen, and later confirmed by that received from the German Imperial Marine Office.

All the facts pointed irresistibly to the conclusion that the return to the United States was the only safe course to pursue.

In the case of the *Styria* the master received a peremptory order from his owner's agents to leave the sulphur at Port Empedocle. While his earlier information was that sulphur had been declared contraband, he was later informed, through the publication of an official declaration from the Italian Minister of Agriculture, that the Spanish Government had agreed to let sulphur pass free. This later information he chose to ignore, not considering it sufficiently "authentic."

If Captain Polack had, in turning back, acted contrary to his own judgment, the question of justification might have arisen, but we confidently submit that in this respect the present cases are on all fours with the case of *The Styria*, and that in these cases, as in the *Styria* case, although the master received instructions from his owners, there was a concurrence of judgment between them as to what was the proper course to pursue.

(b) The majority of the Circuit Court of Appeals hold that the return of the *Cecilie* was due to an apprehension of a non-existent future restraint, but that to justify the return there must be "an actual and operative restraint, and that no merely expected and contingent restraint affords sufficient excuse" (Judge Dodge's Opinion, p. 442).

In so holding the majority of the court ignore the fact that in the *Styria* case there was no actual restraint or danger, either existing or *in futuro*, because the Spanish Government had agreed to permit sulphur to pass free, and during the Spanish-American war this permission was never rescinded.

(c) The majority of the Circuit Court of Appeals attempt to distinguish the present cases from the case of *The Styria* by reason of the fact that in the *Styria* case the bill of lading contained a stipulation that the ports of delivery should be safe (Judge Dodge's Opinion, p. 432), entirely ignoring the fact that in the *Styria* case this stipulation was immaterial and inoperative for the reason that the port of New York was the port of destination and it was not even suggested that this port was at any time unsafe. This court's decision in the *Styria* case did not in any way depend upon this stipulation in the bill of lading, but was upon broader principles of maritime law which should determine the present cases as well.

This is also true of the English cases. (*Pole v. Cetovich* (1860), 9 Com. Bench, N. S., 430; *The Teutonia* (1872), L. R., 4 Priv. Council, 171; *The San Roman* (1873), L. R., 5 Priv. Council, 301; *Nobel's Explosives Co. v. Jenkins* (1896), 2 Q. B., 326.)

(d) The majority of the Circuit Court of Appeals holds in effect that to justify the return of the *Cecilie* an actual state of war must have existed at the time when the deviation occurred, and that no authority exists in law for any other view.

His Honor, Judge Dodge, says (p. 444):

> "But no case is found in which, there being no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made."

This we submit is an erroneous statement of the law which if permitted to stand will cause great confusion.

In *The Teutonia*, L. R., 4 P. C., 171, approved by this court in the *Styria*, the master deviated from the port of Dunkirk, his port of destination, upon information that war had been declared between Prussia and France, *the fact being, however, that war had not been declared and was not in fact declared until three days after such deviation.*

II.

In the circumstances disclosed by the record, the North German Lloyd Directors were not only justified in sending out their wireless message, but it was their duty to do so. The performance of this duty cannot create a liability.

The causes which impelled the directors to dispatch the message to Captain Polack are fully set forth by them in a statement which is stipulated into the record (pp. 348-352). As this statement is of vital importance, as showing justifi-

cation for the recall of the *Cecilie*, we venture to reprint it in full.

> "Up to Wednesday, July 29th, the interpretation of the political situation, which, of course, was followed by us with the greatest attention, from the time of the ultimatum sent by Austria to Servia, and the conflict of interests resulting therefrom, between the powers interested directly or by alliance was essentially a quiet and optimistic one, on the part of the Board of Directors of the North German Lloyd, as up to that time a restricting of the conflict to the powers immediately interested therein, namely, Austria and Servia, was counted upon, and we did not believe as yet in the active participation of Russia and France on the one side, and Germany on the other.
>
> Accordingly, the Board of Directors did not as yet see any reason for any immediate decision in regard to the further movements of our ships.
>
> In this interpretation of the Board of Directors there occurred a decisive change on the evening of the day mentioned, July 29th, owing to the fact that Captain Bartling, the manager of our nautical department, returning from a trip to Berlin on matters concerning his department, brought with him information in regard to a very serious interpretation of the political situation of various governmental officers; according to which it was already being seriously considered there that the remaining European great powers could be drawn in the pending conflict, and that there could be a general European war.
>
> After the return of Captain Bartling, the members of the board of directors at Bremen held a meeting during the night to discuss the measures to be undertaken. They deter-

mined to delegate a member of the board of directors to proceed to Berlin in order that he might make inquiry of government officers and obtain information in regard to the development of events. Baron von Plettenberg was chosen to proceed to Berlin and he started that night.

Special attention was paid by the Board of Directors to the Steamer *Kronprinzessin Cecilie*, after her departure from New York on Tuesday, July 28th, as this ship, owing to her route, had to appear endangered, in case of the breaking out of war, and also required our special attention, owing to the high value of the ship and the cargo.

Upon instructions of the Board of Directors, the Nautical Department figured out exactly what was the latest time that the vessel would have, to receive an order in regard to the continuation or interruption of her journey, and we reached the conclusion that according to the supply of coal on hand, and the duration of the trip in question, the Board of Directors would have to come to a decision in regard to this by latest during the early hours of the afternoon of Friday, July 31st.

In this connection, it was also taken into consideration that owing to the great congestion of the cable and wireless connections, a longer period of transmission of our telegram would have to be figured with. A period of time which actually from the departure of our telegram, July 31st, 2:45 p. m. until its receipt on board of the *Cecilie*, July 31st, 10:09 P. M. true time of place, even exceeded our expectations and actually resulted in the face that the *Cecilie could no longer return* to New York in compliance with our order, but had to select the shorter route to Bar Harbor.

The mission of Baron von Plettenberg,

who arrived in Berlin on July 30th, in the morning, did not bear any positive results on this first day, as he could not obtain any decisive information and indications from the government offices visited by him, in regard to the probable further development of the political situation.

Accordingly our interpretation of the political situation was still a predominantly confident and hopeful one on this day, July 30th, and we allowed our steamer *Main* to leave Bremerhaven for Antwerp as scheduled.

However, on the evening of this day, July 30th, there was issued a general warning to the German Merchant Marine Service through the Admiralty Staff. This warning, which became known to us the same evening, constituted the first official sign for us of the very serious interpretation of the political situation by the German government, and caused us, beginning with this period of time to begin sending the first telegraphic instructions for our vessels in regard to the further procedure of their trips.

On Friday, July 31st, shortly after 2 o'clock in the afternoon, we received from Baron von Plettenberg, the telegraphic information that he had learned from an authoritative source that the declaration of the state of war, 'Erklarung des Kriegszustandes fur das deutsche Reich wegen drohender Kriegsgefahr,' had been perfected, and would shortly be made public.

This 'declaration of the state of war for the German Empire, owing to the "threatening danger of war" ' was then, soon afterwards, at 4:16 in the afternoon, brought to our knowledge by a telegram of the Imperial Marine Office, and the respective Imperial decree was publicly proclaimed on the same afternoon at about 5 o'clock, in Bremen also.

On the basis of this telephonic advice

from Baron von Plettenberg, the telegram was sent to Captain Polack immediately at 2:45, upon the resolution of the members of the Board of Directors assembled at Bremerhaven, recalling the *Cecilie* to New York.

The decree of the state of war for the German Empire, as quoted above, communicated to us by Baron von Plettenberg, offered to the members of the Board of Directors who participated in this resolution, the immediate reason for the recall of the *Cecilie*.

Compared with this decree of a state of war, all other political advices and facts which he had at the time, as expressed in the newspaper material are only of secondary and minor importance of a commentary and explanation of this governmental decree, from which could be seen the causes and gradual developments of the conflict, and the enemies to be expected in case of the breaking out of the war, which however, in itself, and without the supplementary act of the government in declaring the state of war would not, as yet, have caused us to take immediate action in regard to our vessels.

Therefore this decree of a state of war alone can be designated as the decisive fact inducing us to recall the *Cecilie*. * * *

Consequently the considerations which induced us to recall the vessel were to the effect that according to this declaration of the state of war, Kriegszustandes, the outbreak of the war could be considered as most probable."

The majority of the Circuit Court of Appeals hold that these facts did not justify the directors in recalling the *Cecilie*. Judge Bingham characterizes the information contained in the telegram as false and says, that "to permit the claimant to avail itself of the master's decision obtained

under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud" (p. 451).

We submit that this characterization is unjust to the claimant and unwarranted by the facts.

The proclamation of threatening danger of war, followed by the Government warning to German shipowners, and the second proclamation of the existence of a state of war, indicated in precise terms the danger to be apprehended, and although the declaration of a state of war did not in itself amount to a formal declaration of war against any particular power, it was fully understood by the North German Lloyd directors what governments were involved. In the circumstances, the proclamation of the existence of a state of war, carrying with it a declaration of martial law, was equivalent to all intents and purposes to the outbreak of war, certainly so far as the future guidance of the North German Lloyd vessels was concerned.

In phrasing their wireless message as they did, there was no thought in the minds of the directors of deceiving any one, but they were concentrated upon conveying the most precise information to their captain of the seriousness of the situation as they viewed it.

The directors' reasons for saying that war had broken out are expressed, in their own language, in their further statement which has been stipulated into the record (pp. 355-356):

> "The reason why we stated in our telegram to the *Cecilie* that the war had broken out, whereas, up to that time, as a matter of

fact only the proclamation of a state of war, owing to the threatening danger of war had been issued, are the following:

First of all, according to the proclamation of the state of war, of which Baron von Plettenberg advised us, the breaking out of this threatened war within the next 24 hours could be expected with the greatest probability.

Secondly, we stated ourselves, when sending off the telegram that every other information in regard to the political situation, every statement that was not absolutely clear and comprehensive in regard thereto, was inadvisable, and could only lead to misunderstanding and unsafe resolutions.

The sole information that the state of war had been proclaimed would probably have been incomprehensible to the Captain, who, of course, would not have been familiar with the regulations of political law.

Only the information that war had already broken out could show him the political situation in the same degree of distinctness and clearness with which we viewed it here, and told him to observe in the further guidance of the vessel the deportment and care which we considered absolutely necessary here, just as if the war had actually broken out here.

Furthermore we had to count on quite a long period of transmission for our telegrams, during which time, therefore a further aggravation of the situation in the direction of war was to be expected, and we also had to take into consideration that if the breaking out of war had actually occurred, it would most probably have been impossible for us to advise the vessel of this at that time on account of the isolation or interruption of the telegraphic connections.

The wording of our telegram, therefore, occurred purposely in the form that we reported the war as already having broken out.

and has nothing to do with the wording of our telegram code."

We submit that in turning the ship Captain Polack exercised a wise discretion for the benefit of all interests committed to his care, basing his judgment upon information amply sufficient to justify his decision.

It is manifest that upon the facts presented to him there was no other course to take. If war had broken out with France, Russia and England, to go back meant certain capture. If the master had obtained the facts stated in the directors' message from any other credible source, there can be no question but that his action in turning back would have been justified. It follows then that if the action of the master be not justified it is because of the owner's message. In other words, the claim is made, and is supported particularly by the opinion of Judge Bingham, that if the statements in the owner's message were not true, the claimant cannot set up the exercise of the master's judgment as a defense. Judge Bingham says that to permit such a defense would be equivalent to permitting a person to take advantage of his own fraud.

The message was in no respect fraudulent. It was a private message from owner to master. Third persons could not have been, and were not, misled.

There is nothing in the record that suggests that the owner was attempting to commit a fraud, or to obtain any unfair advantage, either of the libelants or of any one else.

If the court is of the opinion that the effect of the wireless message was to substi-

tute the authority of the directors for that of the master, we confidently submit that the facts within the knowledge of the directors not only justified them in recalling the *Cecilie*, but that a moral and legal obligation rested upon them to do so. A proclamation of threatening danger of war had been issued; a general warning had been sent out to German vessels by the Imperial Marine Office and they had received information from an authoritative source that a proclamation of the existence of a state of war, carrying with it a declaration of martial law, had been perfected and would immediately be published, and that short time ultimata would at once be sent to Russia and France. They knew that if they waited later than the afternoon of July 31st they would be unable to recall the *Cecilie* to the United States on account of coal shortage; they knew that she could not in ordinary course reach Plymouth, her first port of call, until the morning of August 3rd; that she could not cross the Channel and reach Cherbourg until some hours later, and that she could under no circumstances reach her home port of Bremerhaven before August 4, and that to reach her home port it would be necessary for her to pass through the full length of the English Channel and the Straits of Dover, encountering war vessels which were sure to be on the lookout for her.

The directors could not embody all this information in a wireless message, and if they had stated merely that a state of war had been proclaimed, this would have been incomprehensible to the captain who was not familiar with the regulations of political law. They, therefore, framed the mes-

sage in such a form that it would express to the captain the actual dangers to be apprehended, at the time of the arrival of the message, with the same degree of clearness as the directors viewed the situation at Bremen.

The libelants have taken the position that the delivery of their gold at Plymouth and Cherbourg is the only question which concerns the Court, entirely ignoring the master's and owners' duty to the passengers, crew and German cargo owners.

In fact counsel for the libelants admitted in open court that it was extremely improbable that the *Cecilie* could have arrived safely at Bremerhaven, which admission is referred to by the District Judge in his opinion (fol. 1600). Counsel asserted that this did not relieve the ship of her obligation to deliver their gold at the ports of destination.

Neither the master nor directors were under any obligation to sacrifice the ship, and the duty rested upon the directors, as well as on the master, to adopt reasonable precautions for the protection of the German cargo which would be subject to seizure in an English or French port, and the passengers of various nationalities, many of whom would be arrested either in the ports of call or in the port of ultimate destination.

Wireless telegraphy furnished a method of communication with the ship, but the directors knew that as the crisis culminated, this method was becoming more and more uncertain, and would finally be entirely cut off, and the duty rested upon them to communicate with Captain Polack while they still had the opportunity. The

dispatch of the wireless message was not the hysterical act of a panic-stricken director, but was the wise precaution of a well-informed board taken for the benefit of all concerned after painstaking inquiry and careful consideration of all the facts.

The test as to whether the owners are to be barred by the form of their message from setting up the master's judgment in concurrence with their own as a defense must be this: If the directors could have included in their message a statement of all the political events which had occurred down to the time of its dispatch, would a prudent master have been justified in turning back? The owners cannot be estopped by what they said if the whole and exact truth would have produced the same result. And we submit that had these owners been able to incorporate in their wireless message all the facts known to them, showing the critical state of affairs and the actual existence of a "state of war", the only possible course for Capt. Polack to have taken would have been to turn back exactly as he did.

Wireless telegraphy does not deprive a ship master of his discretion, but the obligation rests upon the owner on land, in case he acquires information of danger threatening the ship, passengers or cargo, to communicate with his master and give him appropriate instructions for the common safety. To hold that by so doing the owner is incurring liability, would be contrary to public policy, for it would discourage owners from utilizing an obvious means of safety.

If the officers and directors of a corporation which owns a ship owe a duty to passengers, crew

and cargo, as well as to the ship itself, to use modern means of communication to inform the master of the ship of impending dangers which come to their knowledge, such duty must carry with it a corresponding right. If the duty be to protect the different interests from threatening danger, then, when the duty is performed, liability cannot grow out of the performance of it. Such officers and directors in these days of wireless telegraphy may, on account of their situation and their ability to command such means of communication, owe the duty of taking even peremptory action for the protection of all interests. But if they do owe such duty, and exercise their best judgment, they are entitled to the benefit of it. Every consideration which makes the judgment of the master controlling and effective, as relating to all interests, must operate to give the same effect to the judgment of the owner, when he is required to act for the protection of all.

III.

To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril.

The majority of the Circuit Court of Appeals hold that the abandonment of the voyage cannot be justified, because the precaution was obviously for the sake of the vessel, and not the cargo.

The headnote of the reported case succinctly states the substance of the court's decision on this

point (238 Fed. Rep., 699). The headnote reads as follows (subdiv. 3):

> "In such case, the act of the owners in abandoning the voyage cannot be justified on the ground that it is the carrier's duty to take reasonable care of the goods entrusted to him, for the precautions were obviously for the sake of the vessel, and not the cargo, and were intended to place the vessel at a point of safety, should hostilities commence."

We submit that this statement is unsound in law and misleading in fact.

The statement is unsound in law because, to justify a deviation, it was not essential that both ship and cargo should be exposed to a common peril, and the master was not deprived of the right and duty of taking reasonable precautions for the preservation of his ship by reason of the fact that the gold bullion was American property, and therefore exempt from seizure.

The statement is misleading in fact because it assumes that all the cargo on the *Cecilie* was American property, whereas nearly $140,000 worth of mixed cargo belonged to German consignees at Bremen, and there were about 1892 persons on board, including 667 Germans and 406 Austrians, who would have been subject to imprisonment or detention in England or France.

The German cargo owners and the German and Austrian passengers and members of the crew were entitled to just as much consideration as were the Guaranty Trust Company and National City Bank.

In *The Teutonia* (1872) L. R., 4 P. C., 171, the court says (pp. 179-180):

"It was argued, however, on the part of the appellants, that, to justify this course, both ship and cargo must be exposed to a common peril, whilst in the present case the cargo, being the property of a neutral owner, would have been in no danger from being carried into a French port, and it was argued that though a master might be justified in deviating from the direct course of the voyage for the purpose of avoiding a danger to which ship and cargo were exposed, although it might afterward turn out that the information upon which the master acted was incorrect, yet that if the reported danger was a danger to the ship alone, the master would commit a breach of contract by deviating from the direct course of the voyage unless the danger actually existed, and the master could allege that he was prevented by one of the perils excepted in the bill of lading from pursuing his voyage in the direct course. It appears to their Lordships, however, that there is no sound ground for this distinction; if the cargo had been a Prussian cargo it would have been exposed to the same danger as the ship from entering the port at Dunkirk, and it appears to their Lordships that when an English merchant ships goods on board a foreign ship, he cannot expect that the master will act in any respect differently towards his cargo than he would towards a cargo shipped by one of his own country, and that it cannot be contended that the master is deprived of the right of taking reasonable and prudent steps for the preservation of his ship, because from the accident of the cargo not belonging to his own nation, the cargo is not exposed to the same danger as the ship."

That case was followed in *The San Roman* (1873), L. R., 5 P. C., 301, where the Court says (p. 307):

"Their Lordships agree with what was said before in the judgment in the case of *The Teutonia* (L. R., 4 P. C., 171)—that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will run greater risk in their defence, than he would with respect to goods of his own nation."

IV.

The uniform course adopted by all German shipowners in issuing warnings to their ships on July 30th and 31st, 1914, is in itself a clear indication that the interruption of the Cecilie's voyage was fully justified.

The record shows that on July 30th and 31st, 1914, 23 ships of the North German Lloyd and the ships of the Hamburg-American Line, Hansa Line and Standard Oil Company of New Jersey (which were under the German flag), upon receipt of advices from their respective owners, either returned to their ports of departure or sought, or remained in, neutral ports; that no German steamer left Hamburg or Bremerhaven for any foreign port after August 1, 1914, and that the last English bound steamers of the Argo Company which left Bremerhaven on July 30th for London and Hull, upon instructions from their company returned to Bremerhaven August 1st, without having discharged (Stipulations, p. 352, fol. 1408; p. 354; p. 357, fol. 1426).

The uniformity of the action taken by all German ships would seem to indicate sufficient ground for apprehension of danger, but Judge Dodge in his opinion (pp. 446-7) says that the owner's evident object was "not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger."

But in this connection the thought is suggested that if Judge Dodge's conclusion be correct, the German steamship companies would have preferred to gather their ships in their home ports rather than to leave them scattered throughout the world.

V.

To hold that the adoption of modern methods of communication, involving increased safety to shipping, enlarges the liability of shipowners, would be unreasonable and contrary to public policy.

The majority of the Circuit Court of Appeals apparently consider that the adoption of modern methods of communication between owners and masters has deprived the latter of their discretion, and that while a loss through a peril excepted in a bill of lading will not render a ship liable to the cargo owner, a loss incurred in the avoidance of an excepted peril will, at the present

time, fix a liability upon the ship, if information of the peril and the proper way to avoid it has been received by the master from the owner on shore.

The introduction of wireless telegraphy has greatly increased the safety of shippers, but if this decision be permitted to stand, the adoption of precautions by a master for the safety of his ship and the cargo, based upon information received from the ship owner, would involve the latter in a liability from which he would be free if the same precautions were adopted upon information received from a different source.

VI.

The order received by wireless from the Imperial Marine Office may, in itself, be considered a restraint. At least, it shows that in the opinion of the German Government, English, French and Russian Ports would not be safe for German vessels on and after August 1, 1914, and, therefore, constitutes authoritative and conclusive proof of the wisdom of Captain Polack's course.

The record shows that on July 30, 1914, the German Admiralty Staff issued a general warning to the German Merchant Marine Service, and that on August 1, 1914, the Imperial Marine Office sent out a wireless message in the Government Code to all ships of the German Society for Wireless Telegraphy, which read: "Threatening danger

of war. Do not touch at any port England, France, Russia" (Record, p. 259, fol. 1033).

This message, which was received by Captain Polack of the *Cecilie* on August 1st, raises the important question as to whether the order in itself does not constitute a "restraint," having been given by a branch of the German Government to a German ship after the proclamation of a state of war, which was in effect a declaration of martial law for all Germany.

Aside from its mandatory character the message was of the greatest importance as indicating that the situation was so grave that in the opinion of the German Government no German ship should touch at any of the ports mentioned; and yet the majority of the Circuit Court of Appeals have not even mentioned this message in their long and elaborate opinions, and in the face of the declaration of the German Government have decided that British and French ports were safe on August 1st and that they continued to be safe as late as August 3rd, and have held in effect that the owners and master of the *Cecilie* should have set up their own judgment against that of their Government.

VII.

The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.

The majority of the Circuit Court of Appeals have in effect held that because, in their opinion,

the circumstances of the present case would not justify an abandonment for a total loss, if the ship or cargo were insured under a policy covering losses through arrest or restraint, it necessarily follows that there was not such an arrest or restraint as to bring the cases within the exception in the bill of lading.

His Honor Judge Dodge says (p. 441):

> "The phrase here in question (arrest and restraint of princes etc), or some substantial equivalent thereof, has long been familiar in charter-parties, bills of lading, and policies of marine insurance. When 'arrest and restraint,' etc., is a risk assumed by a marine policy, there must be proof, in order to justify abandonment to the insurer and maintain thereupon a claim for constructive total loss, that arrest or restraint etc., was the proximate cause of the abandonment and loss. The peril must operate upon the subject of insurance directly, not circuitously. If there has not in fact been actual arrest or restraint, etc., a loss because of apprehension thereof is not within the policy, unless the apprehension is shown to have been warranted by actual and immediate danger, apparently inevitable and morally certain. This may be regarded as settled by the decisions both in England and the United States; as is hardly disputed on the owner's behalf. Its contention is that a different rule of construction applies in cases arising upon bills of lading, and, in substance, that in such cases apprehension of capture or detention by a hostile power will excuse non-delivery under the exception here relied on, even though no such actual and immediate danger thereof existed, provided that the apprehension was on the whole reasonable."

After referring to *The Styria, Nobel's Explosives Co. v. Jenkins, The Teutonia* and *The Express*, the learned judge says:

> "No sufficient warrant is found in them for the claim that the recognized construction in insurance cases is inapplicable to the exception relied on in the present case."

If this statement be correct it would necessarily follow that nothing would excuse an interruption of the voyage prior to the time of a formal declaration of war, nothwithstanding the fact that the master or owner might have had authentic information that war would actually be declared during the presence of the *Cecilie* in one of her ports of call.

The fallacy of the court's decision, in this particular, results from the failure to appreciate that wholly dissimilar considerations enter into the determination of cases arising under policies of marine insurance and cases arising under bills of lading.

Policies of insurance are contracts of indemnity and in order to justify a recovery the insured must prove, first, that there has been an actual loss of the thing insured, and second, that the proximate cause of the loss is specifically covered by the policy.

To warrant a recovery under a policy of insurance covering arrest and restraint of princes, etc., it is not sufficient to show that the subject of insurance was *in danger* of loss, or that a loss was actually sustained through *fear* of a peril insured against, or in attempting to avoid such peril.

In England a technical and strict rule of inter-

pretation has been applied to losses of this character, and it has been held that even where delivery of a cargo at the port of destination has been prevented by an effectual blockade, and the master, in order to avoid the risk of certain capture put into another port or returned to the port of departure, the loss was one due to the *fear of capture*, and not to one resulting from the peril insured against.

Through all these insurance cases runs the same principle, viz., that to justify an abandonment and claim for a constructive total loss, the peril insured against must have operated *directly* upon the subject of insurance. While the Supreme Court of the United States and the Courts of New York and Pennsylvania have slightly modified the application of the English rule, they still adhere to the principle that the insured peril must operate directly, and not circuitously, upon the subject of insurance. The distinction is not one of principle, but in the application of the principle.

In *Olivera v. Union Ins. Co.* (3 Wheat., 183), an action was brought on a policy in favor of Spanish subjects on a cargo from Baltimore to Havana. The vessel having sailed and being near the mouth of the Chesapeake, February, 1813, the master descried four British frigates, officers from which boarded his vessel and indorsed upon the papers that the Bay of Chesapeake was under blockade, and ordered him to return, and not again to attempt to go out. The blockade was not known in Baltimore when the vessel sailed. The voyage was thereupon given up, and the cargo abandoned to the underwriters. This loss was held to be covered.

Marshall, C. J., delivering the opinion of the court remarked that an embargo was admitted to be a peril within the policy and added, "The application of force is not more direct on the vessel stopped in port by an embargo, than on the vessel stopped in port by a blockading squadron."

In commenting on this decision Mr. Phillips in his work on insurance says, "A distinction is made by the court in this and also a subsequent case, between occlusion in a port, bay, or river, and an exclusion from it; the former being held to be an arrest, restraint and detention within the policy: the latter, not so." *Phillips on Insurance*, Vol. 1, Sec. 1114.

In all these insurance decisions we find an apprehension in the mind of the court, that, to allow a claim for a constructive total loss by arrest or restraint where the thing insured was not actually lost by the *direct* operation of one of these perils, would afford to the insured an inducement to create imaginary dangers whenever the cargo is not likely to reach the port of destination in a sound state, or where the owner has reason to believe that his venture, if carried out, will be unprofitable.

This is well expressed by Lord Alvanley, Ch. J., in *Hadkinson v. Robinson* (3 Bos. & P. 388):

> "*If we were to decide that the sale at Port Mahon was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and by giving notice of abandonment, to throw*

a loss upon the underwriters to which they are not liable by the terms of the policy."

There is also the further consideration that inability to complete the voyage does not necessarily result in the total destruction of the thing insured. This is aptly expressed by the Lord Chief Justice in the case last cited (392):

> "But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, *such circumstances do not amount to a peril operating to the total destruction of the thing insured.*"

Very different considerations enter into the determination of cases arising under bills of lading.

> "Bills of lading contain an undertaking by the shipowner or carrier to deliver safely the goods set forth in them, unless prevented by certain perils known as 'excepted perils' or exceptions, provided that such perils and their consequences could not have been avoided by reasonable care and diligence on the part of the shipowner or carrier and his servants."
>
> *Scrutton on Charter-parties and Bills of Lading*, 7th Ed., p. 195.

A bill of lading constitutes the contract between the shipper and carrier, and where the latter undertakes to exercise reasonable care to prevent a loss from an excepted peril, there is a corresponding assent by the former that the carrier may adopt reasonable precautions to avoid such peril.

It would be an absurdity to hold that the performance of a duty creates a liability for damages.

In the case of a policy of insurance, if an insured peril be the proximate cause of the loss, it is immaterial that some other cause may have contributed to the loss, as for example, the negligence of the insured's servants.

In the case of a bill of lading, even though the excepted peril be the proximate cause of the loss, this will not protect the carrier if the negligence of his servants be a contributing cause, nor if after a loss without such contributory negligence, they fail to take reasonable care to minimize the damage. In the latter case the carrier will be responsible for the increased damage although not liable for the original damage.

Notara v. Henderson, L. R. 7 Q. B., 225.

While the maxim "*causa proxima, non remota, spectatur,*" has been held to apply to policies of insurance, it does not apply to bills of lading.

So if "restraint of princes" be covered by a marine policy and excepted by a bill of lading, in the former case, to render the underwriter liable, the restraint must "operate directly" upon the subject of insurance, and a loss incurred in the avoidance of the restraint is not collectible.

As was said by Bailhache, J., in *Becker v. London Assurance Corp.* (1915) 3 K. B., 410, "*It is clear that the avoidance of a peril* • • • *is not the same as loss by the peril itself.*"

In the case of a bill of lading, however, it being the duty of the carrier not to expose the shipper's goods to a restraint, he incurs no liability by performing this duty, even if the precautions adopted involve a deviation from his course.

The reason for this is obvious, for although, irrespective of the provision of a bill of lading, a shipowner is absolved from liability for losses due to the act of God or the public enemy, yet the obligation always rests upon him to use reasonable care, and if, through his negligence or that of his servants, the goods are exposed to loss from one of these causes, he will be liable. But as the law places upon the shipowner a *duty* to use reasonable care to avoid loss by the act of God or the public enemy, there must be a corresponding *right* on his part to adopt reasonable precautions to that end.

But discussion of this subject is of academic interest merely, for the courts of Great Britain and this country have uniformly refused to apply the insurance rule of construction to cases arising under bills of lading, notwithstanding the fact that in nearly all of the latter cases the libelants have insisted upon the analogy of the insurance decisions.

The true rule is as follows: *A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct course and taking such steps as a prudent man would take for the purpose of avoiding danger, and in so doing he is entitled to consider the safety of his ship as well as the cargo, and the safety of the belligerent as well as of the neutral cargo.*

In *Nobel's Explosives Co. v. Jenkins* (1896) 2 Q. B. Div., 326, although there was a probability of capture, if the ship in question continued on to Yokohama, her port of destination, that probability did not in any sense amount to a "practical certainty," nor had an arrest or restraint of princes, etc., commenced to operate when the mas-

ter put into Hong Kong and discharged his contraband cargo. It was for fear, that if he continued on his voyage, the contraband cargo would be subjected to the excepted peril, that he discharged it at the port of Hong Kong.

And yet, had the contraband cargo been insured under a policy covering arrest and restraint, the probability of capture would not have justified an abandonment to the underwriters at Hong Kong; for fear of an arrest is not the same as an arrest, and the peril insured against had not commenced to operate directly upon the subject of insurance.

In the case cited, Mathew, J., said (p. 331):

> "It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that the fear of seizure, however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* * * * and *Rodoconachi v. Elliott* * * * I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was prevented by restraint of princes and rulers within the meaning of the exception."

Later the learned judge said:

> "But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here,

if the goods had been carried forward, there was every reason to believe that the ship would be detained and the goods of the plaintiffs confiscated. In the words of Willes, J., in *Notara v. Henderson*, * * * 'a fair allowance ought to be made for the difficulties in which the master may be involved. * * * The place, the season—the opportunity and means at hand, the interests of other persons concerned in the adventure and whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. I am of the opinion that the course taken by the captain in landing the goods and landing them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers, because they had protested against the discharge of the goods. But even if this information had reached the captain, it would not have divested him of his original authority and discretion as agent in any emergency for the owners of the ship and the other owners of the cargo."

In *Pole v. Cetorich* (1860) 9 C. B. [N. S.] 430, the plaintiffs' counsel made precisely the same contention as is made by the libelants in the present case. They argued that the defendant's agreement was absolute and that the mere apprehension of capture was no justification for its nonperformance. Byles, J., interrupted the argument by saying (p. 436), "You say the defendant was bound by his contract: *Paradine v. Jane*, Aleyn, 26. The question is, whether the defendant was not bound to take all reasonable precautions to render the risk as little as possible."

The same judge says in his opinion (p. 437):

> "Suppose at the time the captain received orders to proceed to Copenhagen a violent storm arose, would he not be justified in delaying his departure until the storm abated? Or, suppose a French fleet were outside the harbour, and it was morally certain that the vessel would be captured if she ventured out, the plaintiffs' counsel were constrained to contend that it would be the defendant's duty to go out and deliver himself and his ship and cargo to the enemy."

This case was cited with approval by the Privy Council in *The Teutonia* (1872), L. R. 4 P. C., 171, 179, where the Court says: "It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding danger. And their Lordships agree, if authority was wanting, that the case of *Pole v. Cetorich* (9 C. B. [N. S.] 43), is an authority in point." In *The San Roman* (1873) L. R. 5 P. C., 301, 306, the expression used by the Court is "an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience."

If the case of *Pole v. Cetorich* had arisen under a policy of insurance, it could not for a moment be contended that there had been a constructive total loss and no abandonment would have been justified, for the master refused to

leave Falmouth because he apprehended danger from French cruisers if he proceeded to Copenhagen; but the danger from French cruisers never operated directly upon the ship or cargo, and the proximate cause of the plaintiffs' damage was not an arrest or restraint, but the refusal of the master to proceed on his voyage.

In all the cases we have cited the master was held justified in adopting *reasonable precautions* to avoid the operation of the excepted peril, even though such precautions involved a deviation from his course or an abandonment of the voyage. And yet, in not one of them, if the question had arisen under a marine policy covering losses incurred through arrest and restraint, would it have been held that there was a constructive total loss or that an abandonment to the underwriters would be justified.

In the cases at bar, the fact that the rate of freight charged was only about one-eighth of one per cent., in itself, clearly indicates that the carrier did not intend to assume any such liability as that contended for by the Trust Company and Bank.

The statement of Messrs. Convers & Kirlin, counsel for the claimant in the case of *The Styria,* which will be found at page 44 of their Supreme Court brief in that case, is peculiarly applicable to the present cases. The learned counsel say:

> "If the master was justified in believing that there was reasonable probability that *The Styria* would be stopped and searched by the war vessels of Spain if she attempted to carry the sulphur to New York, then, as in *Nobel's Explosives* [sic] *v. Jenkins* (*supra*), there was a restraint of princes and rulers

and the ship was justified in refusing to carry the sulphur.

Sir Robert Phillimore stated the rule in *The San Roman*, L. R., 3 Adm. & Ecc., 593, as follows: 'According to both (the laws of England and Germany) an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, would justify delay.' "

And again, at page 45 of their *Styria* brief, the learned counsel say:

"If the carrier has reasonable ground for believing that his voyage will be attended with danger to the cargo, whether by reason of restraint of princes or otherwise, it is clearly his duty to exercise due care to avoid loss. For breach of this duty he will be held liable."

And again, at page 47:

"But in all cases the question was whether the steps taken were reasonable under the circumstances."

And at page 65:

"After the end of war, and in the peaceful security of its chambers, a court may look back on the events of the time and find that they were frought with less danger than was then apparent. But the master's situation was different. He had actual present responsibilities to discharge, and he had to act in the way which he regarded as the best for all the interests that were in any way entrusted to his charge."

VIII.

The libellants are not entitled to a refund of the prepaid freight.

The suits were brought to recover damages for alleged breach of contract and no claim was made in the libels for a refund of the prepaid freight.

Clause 12 of the bills of lading provides as follows:

> "Also, that the freight is payable on the actual value before shipment. Freight prepaid will not be returned, goods lost or not lost."

In this country and in all foreign jurisdictions the law is settled that if there is an express stipulation in the bill of lading that the prepaid freight shall be retained, irrespective of the uncertainties of the voyage, the shipper cannot recover it back, in the absence of negligence on the part of the carrier.

In *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co., Ltd.* (1904), 130 Fed. Rep., 860 (certiorari denied 195 U. S., 629), it was held by the Circuit Court of Appeals, Ninth Circuit, that a provision in a bill of lading that the freight shall be "considered as earned, steamer or goods lost or not lost at any stage of the entire transit" is valid and enforceable.

Judge Hawley, writing the opinion, says (p. 863):

> "The contract as made between the parties is a valid one, that can be enforced. It is

true, as claimed by appellant, that, where there is no specific agreement to the contrary, freight is not deemed earned until the voyage is completed, and the goods are delivered or ready to be delivered at the point of destination. But this principle has no application whatever to a case like the present, where it is expressly provided:

> 'The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit.'

The true rule in regard to contracts of this character was thus expressed by Lord Ellenborough, C. J., in 1815, in *De Silvale v. Kendall*, 4 M. & S., 37, 42:

> 'By the policy of the law of England freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties to a charter party to covenant by express stipulations in such manner as to control the general operation of law. The question in this case is whether the parties have not so covenanted by the stipulations of this charter party. If the charter party be silent, the law will demand a performance of the voyage; for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (using the word "freight") should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate? * * * And there can be no doubt that the payment of freight may by the agreement of the parties be so exempted.'

In 7 Am. & Eng. Enc. of Law, 246, it is said:

> 'It is competent for the parties to a contract of affreightment to stipulate expressly that the freight, or a part thereof, shall be payable absolutely at the time of the shipment of the cargo, or at a certain time thereafter, without regard to performance of the contract.' "

In *Burn Line, Ltd. v. U. S. & A. S. S. Co.* (1908), 162 Fed. Rep., 298 (certiorari denied 212 U. S., 580), the bills of lading contained the provision:

> "Freight prepaid is considered earned at time of payment, and is not recoverable, ship lost or not lost."

His Honor Judge Ward, delivering the opinion of the Circuit Court of Appeals for the Second Circuit said (p. 300):

> "The prepaid bill of lading freight, even if the goods were not delivered, could not be recovered by the shippers on account of the clause above mentioned."

See also *The Queensmore*, 51 Fed. Rep., 250, aff'd 53 Id., 1022.

In the present cases the right to retain prepaid freight is, by express agreement, absolute, and not dependent upon the success or eventualities of the voyage.

There is no decision in any jurisdiction which denies to the shipowner the right to retain prepaid freight where the bill of lading contains an appropriate provision to that effect, and this right is fully recognized in all the cases.

In *The Kimball* (1865), 3 Wall., 37, 44, it is stated in the opinion of the court, delivered by Mr. Justice Field:

> "Freight being the compensation for the carriage of goods, if paid in advance, is in all cases, unless there is a special agreement to the contrary, to be refunded, if from any cause not attributable to the shipper the goods be not carried" (citing *Watson v. Duykinck* [1808], 3 Johns., 335; *Griggs v. Austin* [1825], 3 Pick., 20; *Phelps v. Williamson* [1852], 5 Sandf., 578).

See also:

36 *Cyc.*, 311;
7 *Am. & Eng. Ency. of Law* (2d Ed.), 246, 248;
Hutchinson on Carriers (3d Ed., 1900), Sec. 831.

The distinction between the English law, and the law existing elsewhere, is that under the former the rule has become firmly settled by early decisions that a prepayment of freight implies an agreement that it is absolute and to be retained, irrespective of the outcome of the voyage, unless this inference be excluded by the express language, or the clear implication is that it was to be treated as a loan, independent of freight; whereas the rule existing in America and elsewhere is that the prepayment is considered to be conditional on the performance of the voyage and can be recovered back, unless there is an express stipulation or clear implication to the contrary.

This distinction is not material in the present case as the bills of lading contain such an express stipulation.

The English rule is discussed in the following authorities:

Abbott on Merchant Ships and Seamen (14th Ed., 1901), pp. 664 *et seq.*;
Maclachlan's Law of Merchant Shipping (5th Ed., 1911), pp. 575-7;
Bryne v. Schiller (1871), L. R. 6 Ex., 319;
Allison v. Bristol Marine Ins. Co. (1876), L. R. 1 App. Cas., 209, 226.

Irrespective of claimant's right to the prepaid freight under the express provision of the bill of lading, it would clearly have been entitled to the freight moneys as compensation for the outward voyage to the point of turning and for the homeward voyage.

The course traversed was far longer than the contemplated voyage would have been, and it was taken by the master as the only safe course in the emergency that had arisen and as one that was for the benefit of the libelants, the completion of the voyage having been prevented.

The same reasoning is applicable to the present case as was applied by Lord Mansfield in *Christy v. Row* (1898), 1 Taunt., 300, and by the Privy Council in *Cargo ex Argos* (1873), L. R. 5 P. C., 134, 155, where it was held that if a ship is prevented from delivering her cargo at or near the port of destination and is compelled to bring it back to the port of shipment, the ship is entitled to compensation in the shape of homeward or "back" freight.

In *Christy v. Row, supra*, Lord Chief Justice Mansfield said (p. 315):

> "Where a ship is chartered upon one voyage outward only, with no reference to her

> return, and no contemplation of a disappointment happening, no decision which I have been able to find, determines what shall be done in case the voyage is defeated; the books throw no light on the subject. The natural justice of the matter seems obvious; that a master should do that which a wise and prudent man would think most conducive to the benefit of all concerned."

In *Cargo ex Argos*, *supra*, the Privy Council, in an opinion delivered by Sir Montague E. Smith, after quoting from the above decision of Lord Mansfield, says (pp. 164-5):

> "The precise point does not seem to have been subsequently decided; but several cases have since arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined. (Amongst others, *Tronson v. Dent*, 8 Moore, P. C. 419; *Notara v. Henderson*, Law Rep., 7 Q. B. 225; *Australian Navigation Company v. Morse*, Law Rep., 4 P. C. 222). It results from them that not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo, in such manner as may be best under the circumstances in which it may be placed; and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing. * * * In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that

the expenses properly incurred may be charged to him.

Their Lordships have no doubt that bringing the goods back to England was in fact the best and cheapest way of making them available to the defendant, and that they were brought back at less charge in the Argos than if they had been sent in another ship."

See also:

The Teutonia (1872), L. R. 4 P. C., 171, 180-1, 183.

Under the law as laid down in the decisions above referred to, it is clear that the libelants are not entitled to a refund of the prepaid freight. In fact, as the course actually traversed was much longer than the contemplated voyage, and the expenses incurred for the cargo owners much greater than they would have been if it had been performed, the claimant would rightfully be entitled to further compensation for these additional services and expenses.

IX.

The decrees of the Circuit Court of Appeals should be reversed, and the cases remanded with instructions to dismiss the libels.

Respectfully submitted,

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Claimant-Petitioners.

April 5, 1917.

Office Supreme Court, U. S.
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JAMES D. MAHER

United States Supreme Court.

OCTOBER TERM, 1916.

No. 922.

STEAMSHIP KRONPRINZESSIN CECILIE,
NORTH GERMAN LLOYD,
Claimant, Appellant,

vs.

NATIONAL CITY BANK OF NEW YORK,
Libellant, Appellee.

BRIEF FOR NATIONAL CITY BANK OF NEW YORK, APPELLEE.

SHEARMAN & STERLING,
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for National City Bank of New York, Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 922.

THE KRONPRINZESSIN CECILIE CASES.

NORTH GERMAN LLOYD, CLAIMANT, *Appellant*,

v.

NATIONAL CITY BANK OF NEW YORK, *Libelant Appellee.*

BRIEF FOR NATIONAL CITY BANK OF NEW YORK, APPELLANT.

To avoid a needless multiplication of briefs, the National City Bank on the main question of liability submits its case on the brief filed by the Guaranty Trust Company, in the preparation of which counsel for the City Bank have collaborated.

This supplemental brief will only discuss the few distinguishing facts in the two cases, the differences having principal reference to the ultimate liquidation of damages, and very little bearing upon the main question as to Appellant's liability under its contract of carriage.

While the entire shipment of the Guaranty Trust Company was to Plymouth for London, part of the National City Bank

shipment was to the same destination and a part to Cherbourg for Paris, both shipments being on the same voyage *en route* to Bremerhaven.

Appellant's argument proceeds upon the assumption that the North German Lloyd Company, acting either through its owner or its captain, had a right before its arrival at either Plymouth or Cherbourg to abandon performance, in anticipation of political complications and a possible declaration of war, if it believed in good faith that an attempt to proceed with the voyage to those ports might in the event of war imperil the safety of the steamer. If this argument be sound the difference of a few hours in the time when the ship would have arrived in Plymouth and Cherbourg respectively becomes unimportant.

If, however, the law be, as we are confident the brief of the Guaranty Trust Company clearly shows, that neither the owner nor the captain had any such right, then the estimated hour of the arrivals at Plymouth or Cherbourg does not affect the question of liability in principle.

The National City Bank had two shipments of gold bullion on the steamship, one valued at $1,061,718.89, to be landed at Plymouth for London, and the other valued at $2,104,254.34, to be landed at Cherbourg for Paris. In the two contracts of carriage for these two shipments, the destination of the ship was given as Plymouth and Cherbourg respectively. The bills of lading contained no intimation that the ship had as an ultimate port of destination Bremen or Bremerhaven. In this respect also the City Bank's case differs from that of the Guaranty Trust Company.

So far as the shipment to Plymouth is concerned it is not necessary to recite the facts more fully set forth in the brief of the Guaranty Trust Company. *The shipment of that Company and the shipment of the National City Bank to Plymouth were on the same vessel and the facts therefore, upon which liability must depend, are precisely the same.*

As to the shipment to Cherbourg, the testimony developed a difference of opinion as to the precise hour, when the Cecilie would have probably reached that port, if its captain had not abandoned his voyage under peremptory orders of his owners.

The appellant claims that its steamer could not have reached Plymouth on August 2d before midnight and that in that event it would have been necessary for it to have remained off Plymouth until five o'clock in the morning of August 3d and that, therefore, allowing an hour for disembarkation at Plymouth, it could not have reached Cherbourg and landed the gold shipment in question before noon of August 3d.

The National City Bank contends, upon the record of the voyage and the record of past voyages under similar circumstances, that the Kronprinzessin would have reached Plymouth before midnight of August 2d and would therefore have reached Cherbourg early in the morning of August the 3d.

Whichever view is taken of the testimony, the fact remains uncontradicted, as found by the Circuit Court of Appeals in the prevailing opinion of Judge DODGE, as follows (p. 12 of printed Opinions):

> "So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose."

Judge HALE, of the District Court, made no finding upon this question (fols. 1600-1602) and the dissenting Judge (PUTNAM, J.) in the Circuit Court of Appeals did not dissent upon that point (p. 35 of Printed Opinions of Circuit Court of Appeals).

It is therefore not important, so far as the question of liability is concerned, which view this Court may take as to the

precise hour of the arrival at Cherbourg on August 3, for the Cherbourg shipment, even on the appellant's theory of the facts, would have been landed in France *at least seven hours* before Germany declared war upon France; and if the appellee's theory of the facts be true, the shipment would have been landed *at least twelve hours* before.

The Cecilie sailed from New York Tuesday, July 28, at 1 A. M. Captain Polack testified that, under the circumstances, he believed that he would not have arrived at Plymouth before midnight on August 2. No reasons are given, however, for this opinion, which was only the conjecture of a party in interest. He testifies that the Cecilie was, compared with the last voyage, twenty-four miles behind at noon on Friday, July 31. He testified that, when he turned about at 10.09 P. M., on July 31, he was 1,070 miles from Plymouth.

This statement was based, however, not upon an observation, but upon dead reckoning. That there may be some doubt about this dead reckoning is indicated by the statement of the Board of Directors at Bremen, based on the careful computations of their Nautical Department, that the Kronprinzessin Cecilie, at the time when she turned about, was only 1,057 miles from Plymouth, instead of 1,070 according to the captain's computation, although based on the same position, 46° 46′ N. and 30° 21′ W.

The captain said that if he had arrived before midnight of Sunday, August 2, he would have disembarked his gold and passengers that night, and would have left Plymouth about 1 A. M. of Monday, August 3; that he would have proceeded at once to Cherbourg; that the running time from Plymouth to Cherbourg was about 5½ hours; that, in that event, he would have arrived at Cherbourg at half-past six or seven o'clock in the morning of Monday, August 3, and would have discharged his cargo and left there between seven and eight o'clock in the morning of August 3; that the running time from Cherbourg to

Bremerhaven is about 22 hours, and that he would, accordingly, have arrived in Bremerhaven at about 6 A. M. of Tuesday, August 4.

At the request of the appellant he submitted a statement of the actual time of the thirteen immediately preceding voyages of the Cecilie from New York to Bremen. From this statement it appears that the average running time from New York to Plymouth was 142 hours and 28 minutes. This would have brought her into Plymouth on the present voyage at 11.28 P. M. of Sunday, August 2. According to the captain's testimony, she could, in that event, have discharged her gold and passengers that night. Her average time at Plymouth for the previous thirteen voyages was 52 minutes. On that basis she would have left Plymouth on Monday morning, August 3, at 20 minutes after midnight. Her average running time from Plymouth to Cherbourg for the thirteen voyages was 4 hours and 55 minutes. On that basis she would have arrived at Cherbourg at 5.15 A. M. that day. Her average time at Cherbourg for the thirteen voyages was 43 minutes. On that basis she would have left Cherbourg on Monday morning, August 3, at 5.58 o'clock A. M. Her average running time from Cherbourg to Bremerhaven for the thirteen voyages was 22 hours, 54 minutes. On that basis she would have arrived at Bremerhaven on Tuesday, August 4, at 4.52 o'clock A. M.

On the immediately preceding June voyage, in which she arrived at Plymouth at twelve minutes after midnight, she left that port an hour later, thus disproving his underlying assumption that his boat could not at once leave Plymouth for Cherbourg, if it arrived at the former place after midnight. On the March voyage she arrived at Plymouth at 4 A. M. and left Plymouth at 5.18 A. M. If she had left Plymouth at 5.18 A. M. of Monday, August 3, 1914, she would, if the average of her thirteen preceding voyages is applied, have arrived at Cherbourg on Monday forenoon, August 3, at 10.13 o'clock A. M.;

she would have left Cherbourg 43 minutes later, at 10.56 A. M., and would have arrived at Bremerhaven 22 hours and 54 minutes later, at 9.50 o'clock A. M. of Tuesday, August 4.

It may be suggested that all this is only conjectural. In the nature of the case it must be. The appellant broke its contract upon a *conjecture* of what might have happened. It cannot complain, if we show by the record of previous voyages, (taking the average) that his conjectures are not borne out by past experience. The time of the year was favorable, the weather propitious and no port regulation required any detention at Plymouth. It is clear therefore that the Cecilie could have reached Cherbourg early in the morning of August 3, and left in less than an hour for her home port.

The progress of events so far as France and Germany are concerned, between July 31, when the steamship turned back, and the early morning of August 3, when she would have arrived in the usual course at Cherbourg, was as follows:

On August 1 the German Chancellor advised the German Ambassador in London that Germany guaranteed that, between then and Monday, August 3, *at 7 P. M.*, the French frontier should not be crossed, if England's acceptance of a German proposal, relative to the neutrality of France, had reached Germany by that time. *This amounted to a guaranty that there would be no hostile operations by land or sea until 7 P. M. of August 3.*

On August 1 the French troops at the border were under orders not to go nearer than 10 kilometers from the frontier. On the same date France gave orders for a general mobilization for purely defensive purposes, stating that French troops would not attack, and that a zone of 10 kilometers was left between the French troops and the frontier. On the same date the German Emperor telegraphed to the King of England that, if France offered neutrality, guaranteed by England, he would refrain from attacking France. On August 1 the French Premier informed the German Ambassador at Paris that the

French mobilization did not necessarily entail war, and that the German Ambassador might stay in Paris. The German Ambassador remained in Paris and the French Ambassador in Berlin until October 4.

On August 2 the German army entered Luxembourg, but the German authorities informed the Minister of State of Luxembourg and the French Foreign Minister that this action did not constitute a hostile act as against either Luxembourg or France. On August 2 the French Government handed a protest to the German Ambassador in Paris in regard to some sporadic difficulties on the frontier between patrols, and informed him that the French Ambassador at Berlin had been instructed to make a formal protest to the German Government against these acts "which are not justified by anything in the present situation." As these acts were made the subject of direct diplomatic protest, it is clear that no state of war existed at that time. Certainly none was recognized by either nation.

During the morning of August 3, the German Foreign Secretary advised the French Ambassador that the German Government had not yet come to a decision as to the severance of diplomatic relations. This necessarily implied the existence of the peace status with all its obligations. This was at the very hour that the Cecelie would have landed the shipment of gold at Cherbourg. On August 3 martial law was proclaimed in France. An official communication was published in Berlin on August 3, stating that the French reply to Germany's note had been received and was unsatisfactory, that France had ordered mobilization, and that the outbreak of war between Germany and France *must be awaited* at any moment. This statement necessarily implies that a state of war did not yet exist between France and Germany.

Finally, at 6 P. M. of August 3, the French Ambassador at Berlin was handed his passports and three-quarters of an hour later, at 6.45 P. M., just fifteen minutes before the expiration of the guaranty of the German Chancellor, the German Ambas-

sador at Paris delivered to the French Minister for Foreign Affairs a declaration, reciting alleged hostile acts of France and announcing that Germany considered itself in a state of war with France. France then for the first time considered herself at war with Germany. Obviously until that time no German merchant vessel was in any peril of capture. The German Ambassador even then announced to the French Foreign Minister :

> " At the same time I have the honor to bring to the knowledge of your Excellency that the German authorities will detain French mercantile vessels in German ports, but they will release them if, within forty-eight hours, they are assured of complete reciprocity."

It thus undoubtedly appears that even on appellant's computation, its steamer would have left Cherbourg at least *eight* hours before a state of war was recognized, while on appellee's conclusion it would have had at least *thirteen* hours, which would have been enough to take its ship more than half way to Bremerhaven.

If the steamship could have safely discharged her cargo at Cherbourg and left that port, the Court is not concerned with her further movements. If she could not have reached Bremerhaven she could then have returned to New York. With that question this appellee is not concerned, as the appellant was at least bound to fulfill its voyage so far as practicable, and as the voyage contemplated arrivals at Plymouth, Cherbourg and Bremerhaven in the order named, the ship should have carried out its voyage so far as practicable. At the hour when war was declared, she would, in the ordinary course, have been from 185 to 275 miles from Cherbourg, or well out from the Channel in the North Sea. Even if there were any French warships in the Channel, which does not appear, she would then have been under the protection of the German fleet. Appellant in its brief (p. 36) asserts that counsel for the

Appellees admitted in open court that "it was extremely improbable that the Cecelie could have arrived safely at Bremerhaven." We deny that any such concession was made, and assert on the contrary that the strong probability was that the Cecilie would have reached its home port in safety. That she would then have been safe from French interference appears from what happened to other German ships. Another Kronprinzessin Cecilie, owned by the Hamburg-American Line, was bound eastward from New York to Hamburg, passing through the English Channel late at night on August 3, and voluntarily put into the port of Falmouth, early in the morning of August 4. She lay there in safety until the morning of August 5, when, war having been declared on Germany by England, she was seized by the British authorities.

On August 4 the German steamship Ophelia cleared from the Custom House at London and sailed for Hamburg.

The Kronprinz Wilhelm, a German steamship, having full knowledge of the situation, cleared from New York for Bremen on August 3, 1914, at 4:30 P. M.

The action of the master in turning back, therefore, was not an exercise of discretion to escape arrest and restraint of princes, which was immediate and threatening and of which the vessel was in danger at the time, but it was clearly the action of the master in obeying definite instructions from his owners, *who feared that war might be declared at some future time*. This is not a "restraint of princes" but a "restraint of politics," which the law does not recognize. To allow the owner to speculate on political possibilities would be to make a farce of its liability as a common carrier and its express contract to deliver.

On account of the fear of what the future might bring forth, the owner had intentionally given the master *false information*, so that he would not use his judgment, but would implicitly obey its orders. It deemed it essential to convey to him such information, *although it knew it to be false*, as would

leave no doubt as to its carrying out its orders. It is clear that the owner cannot avail itself of its own wrong and rely upon an excuse that the master's judgment coincided with its instructions.

A fixed contract of carriage, whose obligations are favored by public policy, cannot be broken upon a mere conjecture as to future political complications. These were known to the appellant when it accepted the shipment. It could have reserved a discretionary right to deviate, if it anticipated the outbreak of war. It did not do so. It covenanted to deliver the gold, unless arrested or restrained by governmental action. Such did not exist. Anticipation is not enough.

The danger of war was as evident upon the date of issuing the bills of lading as it was when the voyage was abandoned and there was no more "arrest and restraint" on the night of July thirty-first than there was on the twenty-seventh.

It should also be remembered that on the arrival of the ship at Plymouth the captain could easily, and without breach of his contract, have discharged the Paris shipment to the National City Bank at Plymouth and transshipped the same from there to Cherbourg for Paris, and immediately left Plymouth early in the morning of August 3 and have been in Bremerhaven several hours before there was any declaration of war with France.

There is no evidence that any French warship was in the vicinity. The only evidence upon this point is the declaration of Sir Edward Grey to the effect that if Germany attacked the coast of France the English fleet would protect it *because the French fleet was mobilized in the Mediterranean.* The main fact is that war did not exist, when the contract of carriage was broken, and on the contrary there was an express assurance that hostilities would not begin until the evening of August 3rd.

The war had not broken out when the voyage was abandoned and the contract of carriage broken. As events proved, war did not exist until after the contract of shipment would have been completed in the ordinary course.

There is not a reported case, in which such a breach of contract is excused merely because of a fear of war, no matter how well grounded such fear may be, unless in cases like that of the *Styria* (186 U. S., p. 1) upon which the Appellant relies, where the contract of carriage expressly gave to the Master a wide discretion as to a safe port and a continuance of the voyage. In that case, war had broken out and the Master exercised a discretion, expressly given him by the contract of carriage, to avoid an undoubted peril. It is well settled that a party to a contract is not justified in breaking it merely because of a fear of war which does not yet exist.

The law is fully and convincingly set forth in the brief of the Guarantee Trust Company, on which, as previously stated, this Appellee relies to establish the Appellant's liability, and the pertinent cases from the time of Chief Justice MARSHALL to the very latest case in the House of Lords during the war there cited.

The decree of the Circuit Court of Appeals should be affirmed with costs.

Respectfully submitted,

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THE KRONPRINZESSIN CECILIE.[1]

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 922. Argued April 16, 17, 1917.—Decided May 7, 1917.

Upon the facts stated in the opinion, *Held*, that the master and owners of the German Steamship "Kronprinzessin Cecilie" were justified in apprehending that she would be seized as a prize, and her German and other passengers detained, if she completed her voyage to Plymouth and Cherbourg on the eve of the present war; that return to this country before Plymouth was reached was a reasonable and justifiable precaution; and that libelants have no cause of action for failure to deliver their shipments of gold at those ports, although, *semble*, the risk did not fall within the exception of "arrest and restraint of princes, rulers or people" expressed in their bills of lading.

In an ordinary contract of carriage, not made in the expectation that war may intervene before delivery, peril of belligerent capture affords an implied exception to the carrier's undertaking, the contract being silent on the subject.

The court rejects the argument that although a shipowner may give up the voyage to avoid capture after war is declared he is never at liberty to anticipate war; and holds that where war is reasonably and correctly anticipated, liability for non-delivery of freight can not depend upon a nice calculation that delivery might have been made and capture avoided if the voyage had gone on.

238 Fed. Rep. 668, reversed.

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[1] The docket title of this case is: *North German Lloyd, Claimant of the Steamship "Kronprinzessin Cecilie," Petitioner*, v. *Guaranty Trust Company of New York and National City Bank of New York.*

THE case is stated in the opinion.

Mr. Joseph Larocque and *Mr. Walter C. Noyes*, with whom *Mr. Joseph D. Bedle* was on the brief, for petitioner:

The case is indistinguishable from *The Styria*, 186 U. S. 1. In that case and in *Nobel's Explosives Co.* v. *Jenkins* (1896), L. R., 2 Q. B. 326, the masters acted under orders from their owners which were just as peremptory as the order received by Captain Polack in this case. In this case as in those the action taken was in accordance with master's independent judgment. In the *Styria Case* there was no actual restraint or danger, either existing or *in futuro*.

Justification of the ship's return did not depend on the existence of an actual state of war. *The Styria*, *supra*; *The Teutonia* (1872), L. R., 4 P. C. 171.

If the officers and directors of a corporation which owns a ship owe a duty to passengers, crew and cargo, as well as to the ship itself, to use modern means of communication to inform the master of impending dangers which come to their knowledge, such duty must carry with it a corresponding right. If the duty be to protect the different interests from threatening danger, then, when the duty is performed, liability cannot grow out of the performance of it. Such officers and directors in these days of wireless telegraphy may owe the duty of taking even peremptory action for the protection of all interests. But if they do owe such duty, and exercise their best judgment, they are entitled to the benefit of it. Every consideration which makes the judgment of the master controlling as relating to all interests must operate to give the same effect to the judgment of the owner, when he is required to act for the protection of all.

To exonerate the ship it was not essential that both ship and cargo be exposed to a common peril.

The German cargo owners and the German and Austrian passengers and members of the crew were entitled to just as much consideration as were the Guaranty Trust Company and National City Bank. *The Teutonia, supra; The San Roman* (1873), L. R., 5 P. C. 301. The uniform course adopted by all German shipowners in issuing warnings to their ships on July 30th and 31st, 1914, is in itself a clear indication that the interruption of the Cecilie's voyage was fully justified.

The order received by wireless from the Imperial Marine Office may, in itself, be considered a restraint. At least, it shows that in the opinion of the German Government, English, French and Russian ports would not be safe for German vessels on and after August 1, 1914, and, therefore, constitutes authoritative and conclusive proof of the wisdom of Captain Polack's course.

The majority of the Circuit Court of Appeals have confused principles which are peculiar to the law of marine insurance with those which are applicable to cases arising under bills of lading.

Policies of insurance are contracts of indemnity. To warrant a recovery under a policy covering arrest and restraint of princes, etc., it is not sufficient to show that the subject of insurance was in danger of loss, or that a loss was actually sustained through fear of a peril insured against, or in attempting to avoid such peril. The peril insured against must have operated directly upon the subject of insurance. See *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183; Phillips on Insurance, vol. 1, § 1114. This rule is largely aimed at fraudulent and factitious claims of constructive loss. *Hadkinson* v. *Robinson*, 3 Bos. & Pul. 388. It is based also on the consideration that the thing insured is not totally destroyed. *Ibid.*

A bill of lading constitutes the contract between the shipper and carrier, and where the latter undertakes to exercise reasonable care to prevent a loss from an excepted

peril, there is a corresponding assent by the former that the carrier may adopt reasonable precautions to avoid such peril.

It would be an absurdity to hold that the performance of a duty creates a liability for damages.

In the case of a bill of lading, even though the excepted peril be the proximate cause, this will not protect the carrier if the negligence of his servants be a contributing cause, nor if after a loss without such contributory negligence they fail to take reasonable care to minimize the damage. In the latter case the carrier will be responsible for the increased damage although not liable for the original damage. It being the duty of the carrier not to expose the shipper's goods to a restraint, he incurs no liability by performing this duty, even if the precautions adopted involve a deviation from his course.

The true rule is as follows: A reasonable apprehension of capture or other imminent peril justifies a master in deviating from his direct course and taking such steps as a prudent man would take for the purpose of avoiding danger, and in so doing he is entitled to consider the safety of his ship as well as the cargo, and the safety of the belligerent as well as of the neutral cargo. *Nobel's Explosives Co.* v. *Jenkins, supra; Pole* v. *Cetovich* (1860), 9 C. B. (N. S.) 430; *The Teutonia* (1872), L. R., 4 P. C. 171, 179; *The San Roman, supra,* p. 306.

The libelants are not entitled to a refund of the prepaid freight.

Mr. J. Parker Kirlin, with whom *Mr. Charles R. Hickox* was on the brief, for the Guaranty Trust Company of New York:

The Kronprinzessin Cecilie was a common carrier, liable as an insurer for failure to deliver the libelant's gold in England unless excused by the terms of the bill of lading. *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397;

Propeller Niagara v. *Cordes*, 21 How. 7, 22; 1 Parson's Ship & Adm., p. 171; Moore on Carriers, p. 306.

The failure to complete the voyage and deliver the cargo is not excused by restraint of princes or other exceptions in the bill of lading. The voyage was not abandoned because of "arrest and restraint of princes." The master received specific and definite orders from his owners to turn back. This message was designedly false in its statement of fact, for war had not broken out between Germany and England, France or Russia, or between any two. The master accepted the message as an order and acted accordingly. His testimony shows that unless and until he received the order from the owners he never intended to abandon his voyage. The exception of "enemies" and "arrest and restraint of princes," is found in juxtaposition with other exceptions dealing with loss or damage caused by violence or by uncontrollable forces. It is, of course, to be construed as *ejusdem generis* with the other excepted causes; that is, it is to be limited to actual arrests and restraints by force, or to steps taken to avoid the reasonable certainty of an arrest and restraint by force, in case the voyage should be continued. In *The Styria*, 186 U. S. 1, the exception was merely "restraints of princes." Having been introduced into the contract by the shipowners, the exception is to be construed against them. *The Caledonia*, 157 U. S. 134, 137; *Compania* v. *Brauer*, 168 U. S. 104, 118; Carver, Carriage by Sea, 5th ed., § 77.

Recalling the vessel and abandoning the voyage from fear or in the expectation that war might break out is quite a different thing from taking such a step to escape the moral certainty of an arrest and restraint.

An arrest involves an actual seizure by hostile forces. *Olivera* v. *Union Ins. Co.*, 3 Wheat. 183, 189. A justifiable fear may be equivalent to an actual arrest but only in such cases as *Nobel's Explosives Co.* v. *Jenkins* (1896), 2 Q. B. 326, where arrest was a practical certainty. The law in

America is clear that a defense, based on an exception of "arrest and restraint of princes" where there is no actual arrest, must establish a danger of capture that was imminent, apparently remediless and morally certain. *Craig* v. *United Insurance Co.*, 6 Johns. 226; *Corp* v. *United Insurance Co.*, 8 Johns. 277; *Oliver* v. *Maryland Insurance Co.*, 7 Cranch, 487; *Smith* v. *Universal Insurance Co.*, 6 Wheat. 176; *Richardson* v. *Maine Ins. Co.*, 6 Massachusetts, 102.

While these cases arose under policies of insurance, the clause of restraint of princes received the same construction that would be given to it in a charter party or bill of lading. *The Xantho* (1887), L. R., 12 App. Cas. 503; *Hamilton* v. *Pandorf* (1887), L. R., 12 App. Cas. 518; *The G. R. Booth*, 171 U. S. 450. In case of a deviation to avoid an arrest the shipper must be able to recover his loss either from his insurer, on the ground that the certainty of arrest which is thus avoided is equivalent to an actual arrest within the meaning of his policy, or from the carrier on the ground that the danger was so remote and uncertain that the deviation was not justified. 1 Parson's Ship. and Adm., p. 172.

The law in England on the subject accords completely with the decisions in our courts. *Hadkinson* v. *Robinson*, 3 Bos. & Pul. 388; *Forster* v. *Christie*, 11 East, 205; *Atkinson* v. *Ritchie*, 10 East, 530; *Nickels* v. *London & Provincial Marine & General Insurance Co.*, 6 Com. Cases, 15; *Kacianoff* v. *China Traders Insurance Co.* (1914), 3 K. B. 1121; *Becker* v. *London Assurance Corporation* (1915), 3 K. B. 410, affirmed (1916), 2 K. B. 156; *Mitsui* v. *Watts, Watts & Co.* (1916), 2 K. B. 826, affirmed by House of Lords March 16, 1917.

The directors were not justified in speculating on the future and assuming that war would break out. *Janson* v. *Driefontein* (1902), A. C. 484, 497, 498; *People* v. *McLeod*, 25 Wend. 483.

In making this shipment on a German rather than a British steamer it cannot be said that the libelant assumed any risk other than in accordance with the terms of the bill of lading. It must be inferred that both parties expected that the contract would be completely carried out unless in the happening of contingencies mentioned in the bill of lading that might prevent performance. It is not to be presumed, in the absence of all evidence, that either France or England would have committed the hostile act of attempting to arrest and detain this German vessel before a state of war between them and the German Empire existed. *Prinz Adalbert*, the *Kronprinzessin Cecilie*, 1916, 32 Times L. R. 378. The liability of the petitioner is to be determined by the posture of affairs that existed. *The Savona* (1900), Prob. 252, 259. The claimant has been unable to produce any proof that the vessel could not have completed the voyage without the intervention of any excepted peril. On the contrary there is no reason on this record to doubt that if the steamer had proceeded on her voyage, she would have reached Plymouth, discharged her cargo, and left in safety.

The abandonment of the voyage would not have been justified if it resulted from an exercise of the master's discretion. If the master can be considered as having exercised any discretion or concurred in judgment with what the owners ordered, it could only be on the assumption that the facts given to him by the owners, in their message, were true. They deliberately told the master a falsehood because they did not dare to rely on his discretion if they told him the truth. The owners' hands are not clean in the matter and they should not be permitted to gain any benefit from their own wrong. *King* v. *Delaware Insurance Co.*, 6 Cranch, 74. The owner cannot justify its order by assuming there was a shortage of coal. The duty of supplying the vessel with a sufficient

quantity of coal for the expected contingencies of the voyage in all its stages was on the shipowner. *The Vortigern* (1899), Prob. 140; *Thin* v. *Richards* (1892), 2 Q. B. 141; *McIver* v. *Tate Steamers* (1903), 1 K. B. 362; *Greenock S. S. Co.* v. *Maritime Ins. Co.* (1903), 2 K. B. 657.

The possibility of increased political tension must have been in the owners' minds when the vessel sailed, and they were bound to supply sufficient coal to meet such expected contingencies.

The master had no general discretion to deviate from the voyage except under the compulsion to avoid an excepted peril, imminent, pressing and which had begun to operate. *Morrison* v. *Shaw S. & A. Co.* (1916), 1 K. B. 747, 758; 1 Parson's Ship. & Adm., p. 21; *The Julia Blake*, 107 U. S. 418, 427, 428; *Blackenhagen* v. *London Assurance Co.*, 1 Camp. 454. His action was not for or in the interest of the shippers. It was not for the success of the voyage but for the sake of the ship. *Nobel's Explosives Co.* v. *Jenkins*, *supra*, and *The Styria*, *supra*, do not apply.

The master had no general discretion to violate the contract for the sake of other goods and passengers. The case is not one in which the doctrines of general average could have application.

It is a necessary inference from *The Julia Blake*, *supra*, and other recent authorities that the ordinary authority of a master has lessened very much in recent years. The telegraph has enabled the owner to perform much of the master's work in foreign ports. The system of printed bills of lading, and the extensive development of regular lines of steamers, with their accompanying agents and branches abroad, have converted the master into little more than the chief navigator of the ship. The master had no right to disobey the owners' orders. *Codwise* v. *Hacker*, 1 Caines, 526; *Robinson* v. *Hinckley*, 2 Paine, 547, 20 Fed. Cas. 1013; *The Roebuck*, 1 Asp. Mar. Law Cas., N. S. 387.

The telegram received by the master on the night of August 1, 1914, twenty-four hours after the steamer had turned back towards New York, purporting to be signed "Country's Naval Office," could not be used to justify the wrongful deviation made twenty-four hours earlier, even if it had been pleaded or properly proved.

If the abandonment was not due, in a legal sense, to an arrest and restraint of princes, it constituted a wrongful deviation, and all clauses in the bills of lading that may have been designed to bar or limit any of the libelant's claims for damages were thereby nullified.

Mr. James M. Beck, with whom *Mr. Carl A. Mead* and *Mr. Edward E. Blodgett* were on the brief, for the National City Bank of New York.

MR. JUSTICE HOLMES delivered the opinion of the court.

This writ was granted to review two decrees that reversed decrees of the District Court dismissing libels against the Steamship Kronprinzessin Cecilie. 238 Fed. Rep. 668. 228 Fed. Rep. 946, 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and, we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1892 persons, of whom

667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 354, Americans; and two or three from Italy, Belgium, Holland, &c. She continued on her voyage until about 11.05 P. M., Greenwich time, July 31, when she turned back; being then in 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich and distant from Plymouth about 1070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia, (July 28,) that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless message to the master: "War has broken out with England, France and Russia. Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 P. M. August 2, and 1 A. M. August 3, and would have delivered the gold destined for England to be forwarded to London by 6 A. M., August 3. On August first at 9.40 P. M., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial

Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered of the seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skirmishes with French troops. On August 3 Germany was at war with France, and at 11 P. M., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, *e. g.*, *Prinz Adalbert* [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers or people," other exceptions necessarily are to be implied, at least unless the phrase restraint of princes be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine* v. *Jane*, Aleyn, 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor* v. *Caldwell*, 3 Best & Smith, 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman* v. *Pollard*, 43 Maine,

463. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co., Limited,* v. *Watts, Watts & Co., Limited,* [1916] 2 K. B. 826, 845. *The Styria,* 186 U. S. 1. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. *The Teutonia,* L. R. 4 P. C. 171. *The San Roman,* L. R. 5 P. C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. *Oliver* v. *Maryland Insurance Co.,* 7 Cranch, 487, 493. *Craig* v. *United Insurance Co.,* 6 Johns. 226, 250, 253. See also *British & Foreign Marine Ins. Co., Limited,* v. *Samuel Sanday & Co.,* [1916] A. C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office if not a binding command at least shows that if the master had remained upon his course one day longer and had received the message it would have been his duty as a prudent man to turn back. But if he had waited till then there would have been a question whether his coal would hold out. Moreover if

he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of *The Styria*, 186 U. S. 1, although not strictly in point tends in the direction of the principles that we adopt.

Decree reversed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the Circuit Court of Appeals—238 Fed. Rep. 668.